

Supreme Court, U. S.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

No. **77-1101**

PAPPAS TELEVISION, INC.,

*Petitioner,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

*Respondents.*

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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(i)

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Pappas Television, Inc., petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 25, 1977.

**OPINION BELOW**

The judgment of the Court of Appeals entered on October 25, 1977, (App., p. 85)<sup>1</sup> has not been

<sup>1</sup>The appendix to this petition is set forth under separate cover.

published. The decisions of the Federal Communications Commission under review in this petition are *Fresno Cable TV Co., Inc.*, 48 F.C.C.2d 116 (1974) (App., p. 8), *reconsideration denied*, 50 F.C.C.2d 340 (1974) (App., p. 22) (Case No. 75-1116, D.C. Cir.); *Fresno Cable Television Company, Inc.*, 57 F.C.C.2d 134 (1975) (App., p. 34), *stay denied*, 60 F.C.C.2d 198 (1976) (App., p. 53) (Case No. 76-1010, D.C. Cir.); *San Joaquin Cable TV*, 59 F.C.C.2d 525 (1976) (App., p. 59), *Stay Denied*, 60 F.C.C.2d 198 (1976) (App., p. 53) (Case No. 76-1010, D.C. Cir.); *Pappas Television, Inc.*, 61 F.C.C.2d 1051 (1976) (App., p. 70) (Case No. 76-2042, D.C. Cir.).

### JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1977, (App., p. 85) and this petition for certiorari is being filed within the time allowed by the Court. By order dated January 24, 1978, Mr. Chief Justice Warren Burger extended to February 6, 1978, the time within which to file a petition for writ of certiorari (No. A-600). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

### STATUTES INVOLVED

Sections 152(a), 303(f), 303(g), 303(r) and 307(b), Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. §151 *et seq.* (App., p. 1-2).

### QUESTIONS PRESENTED

The judgment of the Court of Appeals presents the following questions:

I. Whether the Commission's decisions affirmed by the court below have exceeded the outer limits of FCC

ancillary jurisdiction over CATV in the exercise of its responsibilities for the regulation of television broadcasting.

II. Whether the Commission's decisions, as affirmed by the court below, provided due process in an agency proceeding, and whether they are in conflict with the decision of the first circuit in the case of *Colby-Bates-Bowdoin Educational Telecasting Corporation v. F.C.C.*, 554 F.2d 11 (1976).

III. Whether a station's inability to broadcast news and public affairs programs because of the impact of Cable Television can be determined by the Federal Communications Commission to be outweighed, in public interest terms, by the importation of distant signals by cable systems in the market.

### STATEMENT OF THE CASE

This petition seeks review of an October 25, 1977 *per curiam* judgment of the United States Court of Appeals for the District of Columbia Circuit (App., p. 85) affirming a series of decisions by the Federal Communications Commission (herein "Commission") (App., pp. 8, 22, 34, 53, 59 and 70)<sup>2</sup> denying Pappas

<sup>2</sup>Specifically, the actions of the Federal Communications Commission under review in this petition are *Fresno Cable TV Co., Inc.* 48 F.C.C.2d 116 (1974) (App., p. 8), *reconsideration denied*, 50 F.C.C.2d 340 (1974) (App., p. 22) (Case No. 75-1116, D.C. Cir.); *Fresno Cable Television Company, Inc.*, 57 F.C.C.2d 134 (1975) (App., p. 34), *stay denied*, 60 F.C.C.2d 198 (1976) (App., p. 53) (Case No. 76-1010, D.C. Cir.); *San Joaquin Cable TV*, 59 F.C.C.2d (1976) (App., p. 59), *Stay Denied*, 60 F.C.C.2d 198 (1976) (App., p. 53) (Case No. 76-1010, D.C. Cir.); *Pappas Television, Inc.*, 61 F.C.C.2d 1051 (1976) (App., p. 70) (Case No. 76-2042, D.C. Cir.). Companion cases, Nos. 75-1115 and 75-1408, D.C. Cir., are not under review.



Television, Inc., licensee of Independent UHF Television Station KMPH-TV, identified as Tulare-Fresno, California, any relief against the importation of distant independent television signals<sup>3</sup> by Cable Television systems located in major communities throughout the Fresno television market and served by KMPH-TV. The reviewing court's judgment adopts the decision of the Commission (App., p. 85). Accordingly, what is before this court for review are the actions of the Commission. (App., pp. 8, 22, 34, 53, 59 and 70.)

While Station KMPH is an independent UHF television station licensed to Tulare, California, a community of approximately 16,200 people, it is, along with two other independent stations, three network affiliates, and an educational station, part of the Fresno California television market. Station KMPH commenced operations on October 11, 1971 using a three-million watt transmitter located on a high mountain and places better than a city grade signal well beyond the entire City of Fresno and a Grade B or better signal over all of the Fresno television market (Fresno Area of Dominant Influence or ADI).<sup>4</sup> KMPH's signal covers essentially the same area as the three network affiliates licensed to Fresno.

<sup>3</sup>The term "distant signal" has been given a specialized definition by the Commission as a signal which is extended or received beyond the Guide B contour of that station. See 47 C.F.R. §73.683(a). See also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 163, n. 16 (1968). Here, there is no question that the proposed signals from Oakland and Sacramento are not receivable off the air in the Fresno television market.

<sup>4</sup>The term Area of Dominant Influence or ADI is a term formulated by Arbitron (formerly ARB) to define a television market and is universally accepted in the broadcast field. The Fresno ADI encompasses all of the specific communities involved here.

These proceedings were initiated by KMPH pursuant to 47 C.F.R. §76.7 to obtain relief from the importation of distant independent television signals of UHF stations located in the San Francisco/Oakland market, the seventh largest television market in the country, 47 C.F.R. §76.51(a).<sup>5</sup> Although hampered by the lack of any discernable standards as to what a special relief petition should contain, KMPH submitted extensive data demonstrating its precarious financial position, citing the uniqueness of the market and long history of economic failures, even without CATV competition, by no less than *five* UHF independents.<sup>6</sup> It further pointed out that cable television activity had been initiated in every major community within KMPH's service area in the Fresno Television Market. In addition, in recognition of the cumulative impact that each of these systems would have on KMPH's ability to operate in the public interest, KMPH requested that the Commission consolidate these separate matters into one proceeding in order to avoid the potential of piecemeal decisions.<sup>7</sup> Without some degree of relief from CATV distant signal imports, KMPH argued that it would be severely hampered in its ability to provide local news and public affairs programming and might even be faced with the threat of being forced to cease operations completely.<sup>8</sup>

<sup>5</sup>The Fresno television market, which includes KMPH, is the 72nd television market.

<sup>6</sup>See, App., p. 13, n. 6.

<sup>7</sup>The relief of consolidation was not unique and had been utilized by the Commission in the past under similar circumstances. See, *High Fidelity Cable Television*, 47 F.C.C.2d 73 (1974); *West Hawaii Cable Vision Ltd.*, 46 F.C.C.2d 716 (1974).

<sup>8</sup>Even though the Commission has recognized that local independent UHF stations are the most vulnerable to CATV, the

[footnote continued]

The Commission rejected these arguments as "speculative" (see, e.g., App., pp. 15, 29-30) and inferred that KMPH had not demonstrated that the relief sought would not be harmful to the cable systems involved (App., p. 16), a burden not heretofore imposed on a petitioner. While rejecting the KMPH showing, the Commission, in the same decision, granted relief to station KAIL based on what it called a "compelling demonstration" of need. (App., p. 10.)<sup>9</sup>

After its initial rejections,<sup>10</sup> KMPH, in spite of the fact that it was new and heavily debt ridden, commissioned a complete in-depth economic study (the Cooper Study) of the effect on KMPH of independent signal importation in the KMPH service area namely, the Fresno television market. A critical problem faced by Pappas in the preparation of the study the Commission demanded was the absence of any standards by which the requisite "substantial showing" necessary to overcome the "go, no-go" concept of the rules could be measured. As a consequence, Pappas filed a freedom of information request with the Commission and asked for the information and impact analysis (if any) which formed the basis for the CATV

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rules, paradoxically, prohibit importation of network stations but allow importation of independents. 47 C.F.R. § 76.63.

<sup>9</sup>KAIL's entire demonstration was as follows:

"3. The KAIL renewal application (filed in 1971) reflects the difficult situation in the Fresno market. KAIL's accumulated deficit to July 1, 1970 was \$337,659. The 1970-71 fiscal year brought further losses of \$102,102, increasing the accumulated deficit to \$439,761 (BRCT-557, amendment of 11/26/71). Losses have continued since then." (App., p. 4.)

<sup>10</sup>App., pp. 8 and 22. Also, Case Nos. 75-1115 and 75-1408, D.C. Cir., which are not under review.

rules adopted in the *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972) dealing with the importation of distant television signals. The documents received were utterly useless as guides and, in fact, demonstrated the absence of any standards, either for the adoption of the rules or the evaluation of petitions for relief.<sup>11</sup>

Nevertheless, the Cooper Study was prepared and was initially submitted as a supplement to the Pappas objection to the applications of Fresno Cable Television Co. for Certificates of Compliance for the City of Fresno and unincorporated portions of Fresno County, which represents the heart of KMPH's service area. The Commission refused to consider the study in connection with the Fresno Cable application on the grounds of timeliness, even though Fresno Cable had permitted its certificate requests to remain fatally deficient for the very same period. Instead, the Commission, on its own initiative, established a separate "special relief" proceeding to consider the Cooper Study (App., p. 40, n. 7).<sup>12</sup> When the study was timely filed in connection with the certificate of compliance request of San Joaquin Cable TV for Fresno, the Commission again refused to consider that study except in the "special relief" proceeding. (App., p. 61.)

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<sup>11</sup>The Commission has never disputed this. In fact, it appears that its rules were adopted as a result of an *ex parte* "Consensus Agreement" between the industry leaders, as opposed to open rule making, *Cable Television Report and Order* 36 F.C.C.2d 143, 165 (1972), an approach which has met with judicial skepticism. *Home Box Office v. F.C.C.*, Case No. 75-1280, D.C. Cir. March 25, 1977.

<sup>12</sup>While KMPH did not oppose the establishment of an overall review of cable activity in the Fresno ADI and its effect on KMPH, it is erroneous to say that the special relief proceeding was established with KMPH's consent. (App., p. 89.)



In the special relief proceeding that followed, KMPH responded to the criticisms filed by various participating cable systems with a detailed reply, including the opinions of a second well known and respected media economist (Clay).<sup>13</sup> KMPH reemphasized the total lack of Commission standards for Petitioners to follow in seeking to obtain special relief. Nevertheless, KMPH demonstrated that a substantial loss of revenue would result if the proposed importation of two distant independent stations were permitted<sup>14</sup> and that such losses would cripple any attempts by KMPH to even begin to provide meaningful local news and public affairs programming, much less continue it. The Commission did not disagree with KMPH that a loss of revenues was inevitable nor the showing as to the effect on the station's ability to serve the public interest. It simply concluded that it (the Commission) would not become concerned with the reinvestment policies of the station. (App., p. 83, n 8).

On review, the Court below affirmed the Commission's action noting that in order for a television station to obtain special relief from the importation of distant signals by CATV, the petitioner must prove not only that the local television station would be injured, but also that the grant of such relief would not prevent cable from successfully entering the market. (App., p. 88.)

<sup>13</sup>The Commission in its decision (App., p. 70) completely ignored the comments of the second economist (Clay) who independently reached the same conclusions as Cooper. Mr. Clay's expert testimony has been accepted in numerous Commission proceedings.

<sup>14</sup>KMPH also sought alternative relief such as syndicated program protection under Rule 76.151, 47 C.F.R. § 76.151, which the Commission, on its own motion, has granted in other cases. *Greater New England Television Co.*, 45 F.C.C.2d 597 (1974).

## REASONS FOR GRANTING THE WRIT

### I.

**THE COMMISSION'S DECISIONS, AFFIRMED BY THE COURT BELOW, PRESENT AN IMPORTANT QUESTION OF THE OUTER LIMITS OF FCC ANCILLARY JURISDICTION OVER CATV IN THE EXERCISE OF ITS RESPONSIBILITIES FOR THE REGULATION OF TELEVISION BROADCASTING.**

In its decision, the court below stated that in order to be successful, a petitioner seeking relief under Section 76.7 of the FCC's rules<sup>15</sup> from the importation of distant television signals by CATV systems must show:

"...that the challenged aspects of the cable programming will substantially damage local stations *and* that such aspects could be deleted without preventing cable from successfully entering the market" (underscoring that of the court below). (App., p. 88.)

Thus, the FCC's jurisdiction over CATV has been expanded to encompass not just ancillary control of CATV in the exercise of its responsibilities over television, but a responsibility to insure that cable is able to "successfully" enter the market, even where, as here, that entry substantially damages the local television station's ability to operate in the public interest.

This expanded jurisdiction is the product of a rule making proceeding whereby the Commission, reversing prior determinations, declared that it had the jurisdiction and the basic responsibility "to get cable moving."<sup>16</sup> In short, the Commission extended its

<sup>15</sup>47 C.F.R. § 76.7.

<sup>16</sup>*Cable Television Report and Order*, 36 F.C.C.2d 143, 164 (1972).

non-statutory jurisdiction over CATV to generally encourage the larger and more effective use of cable, even though such action would be detrimental to the Commission's statutory jurisdiction and responsibility "to generally encourage the larger and more effective use of radio in the public interest" and its statutory responsibility for the establishment of a "fair, efficient and equitable distribution" of television service. (47 U.S.C. 303(g), 307(b).)<sup>17</sup>

This court, in the case of *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), sustained FCC jurisdiction over CATV to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Id.* at 178. In so doing, this court recognized the fact, as found by the Commission, that "the importation of distant signals into the service areas of local stations necessarily creates 'substantial competition' for local broadcasting" the result of which was the likelihood of a substantial negative effect upon station audience and revenues. *Id.* at 165. (Emphasis added.)

The Commission's ancillary jurisdiction over CATV was upheld in order that the Commission could carry out its obligation of providing a widely dispersed radio and television service with a fair, efficient and equitable distribution of service among the several states and communities. *Id.* at 173, 174. That obligation requires

<sup>17</sup>Section 307(b) reads as follows:

"(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

for its satisfaction the creation of a system of local broadcasting stations, such that all communities of appreciable size will have at least one television station as an outlet for local self expression, *Id.* at 174, the significance of which can scarcely be exaggerated, *Id.* at 177. Thus, ancillary jurisdiction over CATV was confirmed by this court primarily because importation of distant signals into the service areas of local stations can destroy or seriously degrade the service offered by a television broadcaster and thus ultimately deprives the public of the various benefits of local broadcasting stations. *Id.* at 175.

In the only other case directly concerned with the Commission's jurisdiction over CATV,<sup>18</sup> *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), this court upheld the Commission's 1969 *First Report and Order*, 20 F.C.C.2d 201, requiring CATV systems to originate local programming.<sup>19</sup> There, it was the Commission's position that since "the use of broadcast signals has enabled CATV to finance the construction of higher capacity cable facilities," local origination by certain large systems (over 3500 subscribers) would facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service in areas where the Commission has been unable to accomplish this through broadcast media. *Id.* at 656.<sup>20</sup>

<sup>18</sup>This court specifically noted in *Midwest Video Corp.* that the importation of distant signals into major markets was not an issue before it for consideration. *Id.* at 652, n. 4.

<sup>19</sup>That requirement has since been deleted by the Commission. *Report and Order* (Docket 19988), 49 F.C.C.2d 1090 (1974).

<sup>20</sup>That concept does not apply here since the Fresno television market, which is served by seven television stations, has clearly achieved a fair, efficient and equitable distribution of television service.



*Midwest Video* also reaffirmed the tenets of *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) which held that a broadcast station should not only be ready and willing, *but be able as well* to supply the local program needs by coverage of local events. To be "able" a station must necessarily have the financial wherewithall to carry out its public interest responsibilities.

In his concurring opinion in *Midwest Video, supra*, at 676, the Chief Justice was no less concerned than the four dissenting justices over the question of just how far the Commission's jurisdiction over cable went. He observed there that "the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction [over CATV] that has evolved by decisions of the Commission and the courts."

Here, those outer limits have been exceeded. The Commission has now affirmatively taken the position that it has the jurisdiction and the responsibility to *insure* CATV's *successful* entry into the marketplace,<sup>21</sup> not as a function ancillary to its regulation of television broadcasting, but as a function separate and apart from that regulation. Ancillary jurisdiction has, by Commission fiat, become primary jurisdiction. There is nothing in the Communications Act or the decisions of this court to support that position.

<sup>21</sup>That position is contrary to this court's observation that the backbone of CATV is individual enterprise and ingenuity, not governmental largesse. *National Cable Television Association Inc. v. United States*, 415 U.S. 336 (1974).

## II.

THE COMMISSION'S DECISIONS, AS AFFIRMED BY THE COURT BELOW, RAISE SERIOUS QUESTIONS WITH RESPECT TO DUE PROCESS IN AGENCY PROCEEDINGS AND ARE IN CONFLICT WITH THE DECISION OF THE FIRST CIRCUIT IN THE CASE OF *COLBY-BATES-BOWDOIN EDUCATIONAL TELECASTING CORPORATION V. F.C.C.*, 554 F.2d 11 (1976).

A question that has long plagued petitioners coming before the Federal Communications Commission for relief under its CATV Rules has been the absence of any announced standards used by the Commission in adopting its CATV rules or the particular standards that petitioners must meet and overcome in order to obtain relief. Although this has been a matter of concern for many years,<sup>22</sup> the Commission has steadfastly refused to enunciate its standards. The only thing that petitioners are told is that the Rules are "go, no-go" and that to overcome that concept the petitioners have a "substantial burden." By its deliberate impreciseness, the Commission remains free to be as arbitrary as it pleases. This necessarily deprives the parties appearing before the Commission of due process. Here, Pappas submitted to the Commission an exhaustive study (the Cooper Study) demonstrating that should the CATV systems operate as proposed, the Pappas television station, KMPH-TV, would suffer an approximate eight percent loss in revenue and that losses of such magnitude would prevent KMPH-TV from presenting news and public affairs programming. The Commission, relying on an *ex parte* staff analysis,<sup>23</sup> determined that

<sup>22</sup>See the opinion of Judge Bazelon in *Pikes Peak Broadcasting Co. v. Federal Communications Commission*, 422 F.2d 671, 683 (1969), *Cert. denied*, 395 U.S. 979 (1969).

<sup>23</sup>Pappas, fearing the Commission's arbitrariness, had requested a review of any such staff analysis and asked for oral argument

[footnote continued]



the amount of losses would range between 6 and 6.9 percent. With respect to the fact that such a loss would adversely affect the station's ability to broadcast news and public affairs programming, the Commission simply stated that it was not concerned "with the reinvestment policies of the station" (App., p. 83).

In contrast, a three sentence paragraph submitted by Station KAIL in this very same proceeding reflecting its losses was found to be sufficient to qualify it for special relief. The result was that the programming of an all Spanish UHF television station in Hanford, which is part of the Fresno television market and which places a city grade signal over the communities involved, was kept off the cable in order to protect thirty minutes of Spanish language programming per week broadcast by Station KAIL.

The United States Court of Appeals for the First Circuit in *Colby-Bates-Bowdoin Educational Telecasting Corporation v. F.C.C.*, 534 F.2d 11 (1976) reflected the same concerns as discussed by Judge Bazelon in *Pikes Peak Broadcasting Company*, *supra*. There, however, the First Circuit remanded the case to the Commission because the absence of standards resulted in inexplicable disparate treatment of petitioners. The court further noted its concern with the Commission's use of *ex parte* material without affording the petitioner an opportunity to respond. In contrast to the First Circuit, the D.C. Circuit in this case had no problem with the use of such *ex parte* staff material and accepted the Commission's argument that Pappas had not met the Commission's "standards" without ever identifying what those standards were.

before the Commission in order to insure a full and fair proceeding. The Commission summarily denied that request. *Pappas Television, Inc.* 61 F.C.C.2d 1051, 1056 (1976), App., p. 80.

Such a lack of due process as is the case here necessarily leads to disparate results. The Commission's decision affording relief to KAIL in this very proceeding is but one example. Another is the relief granted from CATV competition to a profitable VHF network affiliate which, with little record support, estimated that it would lose approximately 3.68% of its revenues and might have to cut back its news and public affairs programs. *KID Broadcasting Corp.*, 61 F.C.C.2d 1155 (1976). Still another is *Greater New England Cablevision Co.*, 45 F.C.C.2d 597 (1974), where the Commission granted a network affiliated station in a second 50 market (which already enjoyed network non-duplication protection) syndicated program protection of a kind of applicable to the first 50 markets and did so on its own motion even though it found that the station had not submitted evidence to establish any likelihood of financial injury. Here, the commission was silent on such alternative relief even though requested to consider such by Pappas.

The decision below perpetuates a procedural vacuum that breeds arbitrary decisions to an extent never tolerated by this court and otherwise deprives petitioners of due process.

## III.

THE DECISION THAT STATION KMPH'S INABILITY TO BROADCAST NEWS AND PUBLIC AFFAIRS PROGRAMS BECAUSE OF THE IMPACT OF CABLE TELEVISION WAS OUTWEIGHED, IN PUBLIC INTEREST TERMS, BY THE IMPORTATION OF DISTANT SIGNALS BY CABLE SYSTEMS IN THE MARKET, IS A QUESTION CONTRARY TO OTHER DECISIONS OF THIS COURT.

Prior to the decisions below, it had been universally held that a broadcaster's efforts to serve the local needs and interests of his community were a cardinal concern of the Commission in the exercise of its duties under the Communications Act. Thus, it has been a basic tenet that the major element of the public interest concept is the broadcaster's service to the community and it is generally recognized that programming is the essence of this radio service. See, *Commission Policy on Programming*, F.C.C. 60-970, 20 Pike & Fisher R & R 1901, 1909-1910 (1960).<sup>24</sup> A broadcaster is required to program his station in the public interest,<sup>25</sup> and, as this Court has stated, the ability of a broadcaster to render the best practicable service to the community reached by his broadcasts is a vital consideration to be undertaken by the Commission. See *Federal Communications Commission v. Sanders Bros.*, 309 U.S. 470, 475 (1940). If a licensee does not make the fullest and most effective use of the channel to which it is entrusted, it is not serving the public interest. *National Broadcasting Co. v. United States*, 319 U.S. 190, 203, 218 (1943).

<sup>24</sup>That programming necessarily be attuned to the local needs and interest of the local broadcaster's community of license. See generally *Primer on Ascertainment of Community Problems*, 27 F.C.C.2d 650 (1971).

<sup>25</sup>*Id.* at 1909.

KMPH amply demonstrated to the Commission that its ability to provide the best practicable service to its community in the form of meaningful and regularly scheduled news and public affairs programming would be severely and irreparably damaged if importation of the distant independent signals requested was permitted. This showing went into great detail outlining with specificity the operating and technical costs associated with this new service and demonstrated the detrimental effect importation would have on KMPH's revenues and ability to meet those costs. Although the Commission reluctantly acknowledged that KMPH would indeed be faced with a substantial loss of revenues,<sup>26</sup> the loss of service to KMPH's service area and city of license was considered less important than getting CATV moving.

Here, the Commission cavalierly concluded that "it is simply going too far for the Commission to concern itself with the reinvestment policies of the station" (App., p. 83, n 8). The refusal by the Commission to acknowledge the correlation of the KMPH cost data to service to the community is a rather shocking abandonment of the Commission's responsibility under the Communications Act for the orderly development of an appropriate system of local television broad-

<sup>26</sup>The Commission's own figures (which KMPH disputes) show that KMPH will suffer a 6.1 percent loss of revenues. In *KID Broadcasting Corp.*, 61 F.C.C.2d 1155 (1976), the Commission granted relief to a profitable VHF network affiliated station where a 3.6 percent reduction in revenues was alleged. The Commission, of course, has long recognized that importation of distant signals into the service areas of local stations necessarily creates substantial competition for local broadcasters. *First Report and Order* (Docket No. 14895), 38 F.C.C. 683, 707 (1965).

casting<sup>27</sup> and a failure in its duty to concern itself with potential diminution and destruction of service. *Cf.*, *Carroll Broadcasting Company v. Federal Communications Commission*, 285 F.2d 440, 443 (1958).

What the Commission has done is subvert its primary responsibility to the public interest in order to favor benefits to cable, a determination contrary to the Congressional mandate set forth in the Communications Act<sup>28</sup> and decisions of this Court.

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<sup>27</sup>*See, United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

<sup>28</sup>Sections 303(g) and 307(b).

## CONCLUSION

The decision below endorses an expansion of agency jurisdiction by fiat that is contrary to the Communications Act. Further, it perpetuates a climate of unparalleled arbitrariness in agency proceedings and allows an abandonment of the statutory responsibilities of the Commission by raising the private interests of CATV over the public interest as set forth in Sections 303(g) and 307(b) of the Communications Act. In light of these factors, it is respectfully requested that this petition for certiorari be granted.

Respectfully submitted,

RICHARD HILDRETH

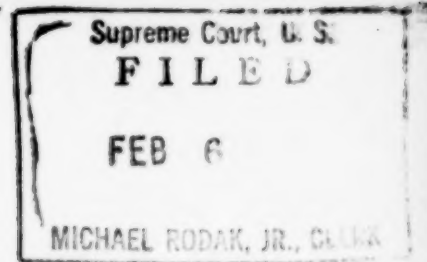
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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

No. 77-1101

PAPPAS TELEVISION, INC.,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA.

*Respondents.*

---

PETITIONER'S APPENDIX

---

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## APPENDIX

Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. §151 *et seq.*

### §152. *Application of Chapter*

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or transmission wholly within the Canal Zone.

\* \* \*

### §303. *Powers and duties of Commission*

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall —

\* \* \*

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission

shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

\* \* \*

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

\* \* \*

---

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In re	]	
FRESNO CABLE TV CO., INC.	]	
Madera and Clovis, California	]	
Application for Certificate of	]	File No. CAC-432
Compliance for Cable Television	]	CAC-433
Systems	]	
To the Cable Television Bureau	]	

TEL-AMERICA CORPORATION OBJECTION TO  
APPLICATION FOR  
CERTIFICATE OF COMPLIANCE

1. Tel-America Corporation is the licensee of UHF Television Station KAIL, Fresno, California. The cities applied for (Madera and Clovis) are less than 25 miles from Fresno, and are within the coverage area of KAIL.

2. The importation of the proposed signals of San Francisco television stations (KTVU, KBHK and KQED) into the Fresno market in the manner proposed can only serve to fragment the audience available for *local* Fresno stations which are incurring the expense of local program origination in order to meet the needs of area residents, including those of Clovis and Madera. The Commission should take note of the difficult competitive situation prevailing in the Fresno market. The other television stations in the Fresno market are three network affiliates and an independent station which is under common ownership with a local AM station. KAIL has none of these advantages, but has continued its efforts to establish a place in the Fresno market.

3. The KAIL renewal application (filed in 1971) reflects the difficult situation in the Fresno market. KAIL's accumulated deficit to July 1, 1970 was \$337,659. The 1970-71 fiscal year brought further losses of \$102,102, increasing the accumulated deficit to \$439,761 (BRCT-557, amendment of 11/26/71). Losses have continued since then.

4. The policy considerations which support the importation of distant signals into rural areas which would otherwise remain without adequate service simply do not apply to a market with a full complement of *local* stations like Fresno, especially when some of them may not be able to attract sufficient revenue to continue their local program service. Draining off the audience in the Fresno market by providing major metropolitan stations' signals is hardly conducive to the development and continuation of local program origination.

5. KAIL also objects to Fresno Cable's proposal to carry KFTV, Hanford, as another distant signal. KFTV is an outstanding permittee (not now on the air) which proposed to broadcast Spanish-language programming as a *100% satellite* of a Los Angeles station. KAIL has for years carried a substantial amount of programming of special interest to the large Spanish-speaking population in the Fresno area, *locally originated*, and of course responsive to the particular problems and concerns of the *local* Spanish-speaking population. To permit fragmentation of KAIL's audience to the north of Fresno by importing a Spanish-language program service from Los Angeles (through a satellite station) is surely inimical to the development of local ethnic-oriented programming. Such a policy would lead eventually to the nation's widely-scattered minority population being served *only* by ethnic programming from the few largest metropoli-

tan centers, leaving substantial minority groups in smaller cities like Fresno without locally responsive programming. That result is contrary to the mandate of Section 307(b) of the Communications Act.

6. The KAIL renewal application (BRCT-557) shows that KAIL has carried these Spanish programs:

ESTA LA VIDA: 30 minutes weekly (Exhibit 4c and 5d)

ABC's OF INCOME TAX—Spanish: Carried in March 1971 (Exhibit 5d)

Newscasts in Spanish by Frederico Gomez, Tiburcio Garcia and Henry Ortega (Exhibit 6)

KAIL has a Spanish director and interpreter (Exhibit 11). KAIL has received numerous awards and commendations for its Spanish programming, as well as receiving the support of the Mexican-American public and its major civic and religious organizations (Exhibit 14).

7. The Commission's oft-expressed concern for the interests of minority groups is not consistent with allowing unlimited importation of distant-city minority-oriented programming which fragments the audience for *local* programming of special interest to the Spanish-speaking population. Accordingly, the proposal for importation of the KFTV signal must be rejected.

ACCORDINGLY, the requested certificates cannot be granted as requested, but must be conditioned to provide against importation of distant signals from San Francisco and Hanford as outlined above.

Respectfully submitted,

TEL-AMERICA CORPORATION

By /s/ Samuel Miller  
Samuel Miller

/s/ Mark E. Fields  
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Certificate of Service

This is to certify that I have, on this 12th day of July, 1972, deposited in the U.S. mails, postage prepaid, a true and correct copy of the foregoing, to the following:

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[48 F.C.C.2d 116-122]

FCC 74-845

[116]

## BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	)	
Fresno Cable TV Co., Inc.,	)	CAC-432,
Madera, Calif.	)	CSR-171, CA441
	)	CAC-433,
Fresno Cable TV Co., Inc.,	)	CSR-172, CA442
Clovis, Calif.	)	
For Certificates of Compliance	)	

## MEMORANDUM OF OPINION AND ORDER

(Adopted July 31, 1974; Released August 9, 1974)

## BY THE COMMISSION:

1. Fresno Cable TV Company, Inc. (hereafter Fresno Cable), has filed the above-captioned applications for certification to commence cable television operations at Madera, and Clovis, California.<sup>1</sup> Fresno Cable proposes to carry the following California television signals:

KMJ-TV (NBC, Channel 24) Fresno, California  
 KFSN-TV (CBS, Channel 30) Fresno, California  
 KJEO (ABC, Channel 47) Fresno, California  
 KAIL (Ind., Channel 53) Fresno, California  
 KFTV (Span. Lang., Channel 21) Hanford, California

<sup>1</sup>Clovis (pop. 13,856), and Madera (pop. 16,044) [1970 census] are located within the specified zone of the Fresno, California, major television market (#72).

KTXL (Ind., Channel 40) Sacramento, California  
 KTVU (Ind., Channel 2) Oakland, California  
 KQED (Educ., Channel 9) San Francisco, California

This proposal is consistent with Section 76.63(a) of the Commission's Rules. Fresno Cable plans to construct 30-channel capacity systems and to provide the full complement of access facilities and services required by Section 76.251 of the Rules. Fresno Cable's applications are opposed by Camellia City Telecasters, Inc., licensee of Television Broadcast Station KTXL, Sacramento; Tel-America Corporation, licensee of Television Broadcast Station KAIL, Fresno; and Pappas Television, Inc., licensee of Television Broadcast Station KMPH, Tulare, California. Additionally, Pappas has filed "Petition[s] for Special Relief" (CSR-171, 172) which are supported by "Comments" filed by Capital Cities Broadcasting Corporation, licensee of Station KFSN-TV, Fresno. Fresno Cable has replied.

2. Camellia's objections were prompted by Fresno Cable's original request to carry KBHK-TV (Ind., Channel 44), San Francisco, instead of Camellia's KTXL. In response to these objections, Fresno Cable amended its applications on March 27, 1973, to delete its request to carry KBHK-TV and to request carriage of KTXL. On March 30, 1973, Camellia filed pleadings requesting that its objections be dismissed. In view of the foregoing, the objections filed by Camellia will be dismissed as moot.

3. Tel-America objects to Fresno Cable's proposal to import educational and independent signals from San Francisco into the Fresno market, and to the cable systems' proposed carriage of Spanish language Station KFTV, Hanford. Tel-America argues that importation of



San Francisco signals would "only serve to fragment the audience available for local Fresno stations which are incurring the expense of local program origination in order to meet the needs of area residents." This fragmentation, Tel-America continues, would endanger financially insecure stations, such as Tel-America's KAIL, and would frustrate their attempts to establish a foothold in what is alleged to be a highly competitive television market. Carriage of KFTV, Tel-America asserts, would seriously fragment a specialized audience and would, therefore, inhibit KAIL in its attempt to develop locally originated and locally responsive Spanish language programming.<sup>2</sup> The Commission is persuaded that special circumstances exist in the present case to warrant granting Tel-America some relief. As we noted in Paragraph 96 of the *Cable Television Report and Order*, 36 FCC 2d 143, 180 (1972):

Where there is a local station broadcasting predominantly in a foreign language, the added diversity provided by the carriage of distant foreign language stations broadcasting in the same language will be permitted unless the local station demonstrates that such importation will adversely affect its ability to serve the public.

We further clarified the type of showing necessary to obtain relief in Paragraph 23 of the *Reconsideration*, 36 FCC 2d 326, where we indicated we would grant special relief pursuant to Section 76.7 of the Commission's Rules only in unusual circumstances where the station made a compelling demonstration. In this case, we are faced with an extremely vulnerable UHF station that has suffered continuing losses, and is,

<sup>2</sup>KFTV currently operates as a full-time satellite of Spanish language Station KMEX-TV, Los Angeles, California.

at this time, going through considerable expense to upgrade its facilities in an attempt to become a viable local Spanish language outlet. We believe, based on the information before us, that this attempt to become a viable local Spanish language station could be destroyed by the carriage of another Spanish language station. Accordingly, we will deny Fresno Cable's proposed carriage of KFTV.

4. Pappas requests that Fresno Cable's applications be dismissed as procedurally defective because (1) Fresno Cable failed to serve Pappas with the information required by Section 76.13(b)(1) of the Rules,<sup>3</sup> and (2) Fresno Cable failed to submit, with its original applications, copies of its franchises and statements explaining how those franchises are consistent with the Commission's Rules. Substantively, Pappas requests that certification of Fresno Cable's applications be conditioned upon (a) carriage of KMPH and (b) non-[118] carriage of any distant independent television station. To support this request, Pappas raises the following arguments:

(1) Even though Clovis and Madera are located beyond the specified zone of the Tulare television market, KMPH is nonetheless a "local station" that has an affirmative obligation to serve these communities. This obligation will be frustrated if KMPH is denied carriage rights on cable systems located in these communities.

(2) KMPH is "significantly viewed" in Clovis and Madera, even though the station is not afforded that status by Section 76.54(a) of the Rules and

<sup>3</sup>Pappas' KMPH places a predicted Grade B contour over the communities of Clovis and Madera.

Appendix B of the *Reconsideration*.<sup>4</sup> KMPH was not listed as a "significantly viewed" station because it was not broadcasting during the survey periods utilized by the Commission in compiling its list of "significantly viewed" signals.<sup>5</sup> To secure mandatory carriage rights under Section 76.54(b), Pappas would have to submit surveys demonstrating the viewing strength of KMPH for each cable television community where such carriage rights are sought. Because Pappas is seeking mandatory carriage rights for KMPH throughout the lower San Joaquin Valley, it would be forced to incur onerous expenses in order to prepare and submit such showings. This burden is imposed upon Pappas solely because KMPH was not broadcasting when the original list of signals in Appendix B of the *Reconsideration* was prepared. In this respect, Section 76.54(b) discriminates against KMPH because it is a "new" television station.

(3) Pappas' current financial position is precarious. This position will be eroded further by the competitive disadvantage Pappas will face if KMPH is not afforded the same signal carriage rights provided other Fresno market stations.

(4) The Fresno television market is unique and highly competitive, and independent television stations have consistently encountered difficulties in

<sup>4</sup>Section 76.54(b) of the Commission's Rules provides that: Signals that are significantly viewed in a county (and thus are deemed to be significantly viewed within all communities within the county) are those that are listed in Appendix B of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order* (Docket 18397 et al.). FCC 72-530.

<sup>5</sup>KMPH commenced operations on October 11, 1971. The Commission utilized surveys conducted by the American Research Bureau during May, 1970, November, 1970, and February-March, 1971, in preparing its list of "significantly viewed" signals.

attempting to establish a position in the market.<sup>6</sup> Pappas has invested over a million dollars in facilities and equipment in an attempt to reverse this trend, and it will not succeed if it is denied carriage rights on cable television systems located outside the specified zone of Tulare.

(5) The unique and competitive nature of the Fresno market, coupled with the financial insecurity of KMPH, warrants Commission action insulating that station from competition by the distant independent signals Fresno Cable proposes to import. [119] The dilution in audience strength that would be caused by this competition would only serve to aggravate KMPH's already precarious position.

5. Pappas' procedural arguments do not persuade us to dismiss the present applications. Fresno Cable's failure to serve Pappas with the information required by Section 76.13(b)(1) of the Rules has in no way prejudiced Pappas. Pappas had actual notice that the applications were filed and was able to respond to them in its objections and petitions for special relief. Pappas claims it was prejudiced because it had a shorter time in which to prepare its arguments. It did not, however, request an extension of time to file objections. Furthermore, Fresno Cable served Pappas with copies of all its further pleadings. Fresno Cable's original failure

<sup>6</sup>KVVG, Tulare, suffered economic reverses during the 1950's and went dark. KDAS (later KSJV-TV and now KFTV) failed under a number of licensees during the 1960's and is now operated as a satellite of KMEX-TV, Los Angeles. KICU-TV, Visalia, went dark in November, 1968. KAIL, Fresno, followed suit on April 17, 1973. Seven commercial UHF channels are allocated to Fresno, Hanford, Tulare, and Visalia, and all have been occupied by licensees or permittees at various points in time. Until KAIL went dark last year, the Fresno ADI was the smallest market in the nation to be served by three local independent stations.



to demonstrate compliance with Section 76.31 of the Rules was rectified in supplements, filed January 30, 1973, which included, copies of the franchises and subsequent amendments thereto. Since the franchises were granted on April 19 (Madera), and June 7 (Clovis), 1967, Fresno Cable need only demonstrate that they are "substantially consistent" with Section 76.31. See "Note" to Section 76.13(b)(3) of the Commission's Rules. Although Pappas has not responded to the supplements, we note that, with some exceptions, the franchises conform fully with Section 76.31.<sup>7</sup> We conclude that the franchises submitted by Fresno Cable are substantially consistent with Section 76.31. See *CATV of Rockford, Inc.*, FCC 72-1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73-293, 40 FCC 2d 493 (1973).

6. We are, likewise, not persuaded that we would be serving the public interest by rejecting Fresno Cable's proposal to supply its subscribers with independent programming from San Francisco and Sacramento market television stations. We note, initially, that this proposal is fully consistent with Section 76.63(a) of our Rules. In Paragraph 112 of the *Cable Television Report and Order*, *supra*, at 186-87, we stated:

---

<sup>7</sup>The franchises are for 20-year terms, and they impose annual franchise fees of 5 percent (for the first two years of operation) and 5½ percent (for subsequent years). On November 6, 1972, the Clovis City Council adopted a resolution establishing a subscriber complaint procedure, providing for the incorporation of all future modifications of Section 76.31, and assuring that the franchise grant was preceded by a review of Fresno Cable's legal, character, financial, technical, and other qualifications as part of a public proceeding affording due process. An identical resolution was adopted by the City Council of Madera on December 4, 1972.

The [signal carriage] rules will operate on a "go, no-go" basis—i.e., the carriage rules reflect our determination of what is, at this time, in the public interest with respect to cable carriage of local and distant signals. We will, of course, consider objections to signal carriage applications and have retained special relief rules, but those seeking signal carriage restrictions on otherwise permitted signals have a substantial burden. Before restrictions are imposed in such cases, there will have to be a clear showing that the proposed service is not consistent with the orderly integration of cable television service into the national communications structure and that the results would be inimical to the public interest. We have during the course of this proceeding fully considered the question of impact on local television service and we do not expect to re-evaluate that general question in individual cases.

Additionally, in Paragraph 113 of the *Cable Television Report and Order*, *supra*, at 187, we explained that "there must be a substantial showing to warrant deviation from the 'go, no-go' concept of the Rules." The "substantial showing" standard was clarified in *Gerity* [120] *Broadcasting Co.*, FCC 72-651, 36 FCC 2d 69 (1972), in which we held that such showing must "contain specificity of fact, showing injury to the public" before special relief could be granted. Although Pappas has submitted showings demonstrating its financial insecurity, its argument that KMPH will suffer further economic injury as a direct result of Fresno Cable's proposed distant signal carriage is, at best, no less speculative and inclusive than arguments this Commission has rejected in the past. *Spectrum Cable Systems, Inc.*, FCC 73-257, 40 FCC 2d 1019 (1973),

recons. denied, FCC 73-1342, 44 FCC 2d 867 (1973); *Greater New England Cablevision Co.*, FCC 74-42, 45 FCC 2d 597 (1974);<sup>8</sup> *Valley Cable Vision, Inc.*, FCC 73-1246, 44 FCC 2d 232 (1973). Additionally, Pappas has submitted nothing to support its assertion that carriage of only "local" television stations, coupled with the presentation of origination and access programming, will provide sufficient inducements to attract subscribers and make Fresno Cable's operations in these communities viable. In this respect, Pappas has not demonstrated that a grant of its request would facilitate "the orderly integration of cable television service into the national communications structure." Para. 112, *Cable Television Report and Order*, *supra*. Accordingly, Pappas' request that Fresno Cable be prohibited from carrying distant independent signals on its cable systems at Clovis and Madera, California, will be denied.

7. We find merit, however, in Pappas' request for expanded carriage rights in the lower San Joaquin Valley. It seems clear that KMPH will suffer a substantial competitive disadvantage if it is not afforded signal carriage rights at least as expansive as those enjoyed by competing stations in the Fresno market. It seems equally clear that KMPH can acquire such rights only if it can establish, pursuant to the procedures outlined in Sections 76.54(b) and (c) of the Rules,<sup>9</sup>

<sup>8</sup> Appeals pending *sub nom.*, *Springfield Television Broadcasting Corp. v. F.C.C.*, Case Nos. 74-1214, 1215, D.C. Circuit, and *The WHYN Stations Corp. v. F.C.C.*, Case Nos. 74-1216, 1217, D.C. Circuit.

<sup>9</sup> Sections 76.54(b) and (c) of the Commission's Rules provide that:

(b) On or after March 31, 1973, significant viewing in a cable television community for signals not shown as significantly viewed under paragraph (a) of this section may

[footnote continued]

that it is "significantly viewed" in each cable community where carriage is desired. The cost of preparing and submitting special surveys demonstrating KMPH's viewing strength in each existing and potential cable community in the lower San Joaquin Valley would be substantial and would probably preclude an attempt by Pappas to submit such showings for most such communities. Consequently, it appears that the application of Section 76.54 in this market imposes an undue burden upon KMPH in acquiring signal carriage rights coextensive with those held [121] by other market stations because KMPH was not broadcasting between May, 1970, and March, 1971, when ARB conducted the surveys we used in preparing the list of "significantly viewed" signals. In adopting our present

be demonstrated by an independent professional audience survey of non-cable television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September. If two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing level. If surveys are taken for more than two weekly periods in any 12 months, all such surveys must be submitted and the combined surveys must result in an average figure at least one standard error above the required viewing level.

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community is located, in whole or in part, and on all cable systems, franchisees, and franchise applicants in the cable community at least thirty (30) days prior to the initial survey period. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.



cable rules, we decided to utilize county-wide data to determine viewing strength of television broadcast stations, even though we recognized that such data "may not account for variations in viewing levels among communities within [a] county", because (1) county-wide data is generally used by the television industry without differentiation between communities within counties, and (2) utilization of existing data and accepted techniques would promote a degree of certainty that could not otherwise be achieved. Para. 85, *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 175-6 (1972). We reaffirmed this decision in the *Reconsideration*, indicating that, while we recognized our choice of a county-wide basis to be "at best a choice among reasonable alternatives", community by community viewing data "was simply not . . . available." Paras. 53, 60, *Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326, 345-6, 348-9 (1972). We were, however, unwilling at that time to expand our utilization of county-wide data, and we "saw no reason" to permit special viewing strength surveys, submitted pursuant to Sections 76.54(b) and (c), to be undertaken on a county-wide basis, *id.*, Para. 60, although we did note the concern expressed by some broadcasters that this conclusion would aggravate the difficulties television stations would face in establishing "significantly viewed" status under those sections, "especially if they [were] new stations or [had] recently improved their facilities or programming." Addressing this concern, we indicated that:

In these circumstances, it would not be appropriate to set conditions automatically discouraging carriage or act to penalize cable systems seeking carriage of such stations by forcing a

choice between deletion of stations to which subscribers have become accustomed and the addition of stations whose off-the-air audience has improved. Thus, while we do not anticipate problems in this area, if problems do arise, they can best be considered in individual proceedings.

Para. 63, *Reconsideration, supra*, at 350. We conclude that the special survey requirements of Sections 76.54(b) and (c) do operate to discourage carriage of KMPH and to penalize cable systems in the lower San Joaquin Valley seeking carriage of that station. Accordingly, we have decided that the public interest would be served by a grant of special relief to Pappas Television, Inc. The extent of and conditions to that relief will be as follows:

(a) We will grant a partial waiver of Section 76.54(b) to permit Pappas to submit surveys demonstrating the viewing strength of KMPH on a county-wide, as opposed to a per-community basis. We emphasize that, although they may gauge viewing strength on a county-wide basis, the surveys submitted must in all other respects conform fully to the standards specified in Section 76.54(b).<sup>10</sup>

(b) We recognize that data sufficient to adequately demonstrate KMPH's viewing strength in the lower San Joaquin Valley may [122] have already been compiled, and we do not wish to prevent Pappas from utilizing such data in the showing we are permitting it to submit. Accordingly, we will grant a waiver of Section 76.54(c) and will not require Pappas to serve notification of its intent to submit a special showing 30 days prior to the initial survey

<sup>10</sup>However, we will additionally waive the requirement of Section 76.54(b) that "... surveys result in an average figure at least one standard error above the required viewing level."



period it proposes to utilize in making such a showing.

(c) In lieu of the notice procedures outlined in Section 76.54(c), we will require Pappas to submit to the Commission, and to serve upon the licensee or permittee of any television broadcast station placing a predicted Grade B contour over all or any part of any county in which Pappas proposes to demonstrate KMPH's viewing strength, the certified results of all independent professional audience surveys utilized to demonstrate such viewing strength. The Commission will entertain objections or comments filed by the above-described licensees or permittees, if such objections or comments are filed within 30 days after service of the above-described survey results. If, upon review of those results, we find KMPH is "significantly viewed" in a county [i.e., that the station has a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent in that county], we will afford the station mandatory signal carriage rights on all cable systems operating or proposing to operate in that county.

8. We emphasize that the relief we are granting by this action is experimental in nature. Until we have had an opportunity to evaluate its effect upon the parties involved or interested in these proceedings, we will be unwilling to grant similar relief in different markets.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications for certificates of compliance would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection[s] to Applications," filed by Camellia City Telecasters, Inc., on July 12, 1972, ARE DISMISSED as moot.

IT IS FURTHER ORDERED, That the "Objection[s]" filed by Tel-America Corporation on July 12, 1972, ARE GRANTED to the extent indicated in paragraph 3 above.

IT IS FURTHER ORDERED, That the "Objection[s]" and "Petition[s] for Special Relief" (CSR-171, 172), filed by Pappas Television, Inc., on July 12, 1972, and the "Comments on Petition[s] for Special Relief," filed by Capital Cities Broadcasting Corporation on August 11, 1972, ARE GRANTED, to the extent and under the conditions specified herein, and in all other respects ARE DENIED.

IT IS FURTHER ORDERED, That the "Application[s] for Certificate of Compliance" (CAC-432, 433), filed by Fresno Cable TV Company, Inc., ARE GRANTED, until March 31, 1977, and appropriate certificates of compliance will be issued.

Federal Communications Commission,  
Vincent J. Mullins, *Secretary*.

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[50 F.C.C.2d 340-345]

FCC 74-1396

[340]                    **BEFORE THE**  
**FEDERAL COMMUNICATIONS COMMISSION**  
 WASHINGTON, D.C. 20554

In Re Applications of	)	
Fresno Cable TV Co., Inc.,	)	CAC-432,
Madera, Calif.	)	CSR-171, CA441
	)	CAC-433,
Fresno Cable TV Co., Inc.,	)	CSR-172, CA442
Clovis, Calif.	)	
For Certificates of Compliance	)	

**MEMORANDUM OPINION AND ORDER**

(Adopted December 17, 1974; Released January 6, 1975)

**BY THE COMMISSION:**

1. Spanish International Communications Corporation, licensee of Station KFTV (Spanish language, Channel 21) Hanford, California, and Pappas Television, Inc., licensee of Television Broadcast Station KMPH (Ind., Channel 26) Tulare, California, seek reconsideration of Commission action taken in *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116 (1974). Pappas's [sic] petition is opposed by Fresno Cable TV Company, Inc., and Spanish International's petition is unopposed. Pappas has replied to the opposition of Fresno Cable.

2. Spanish International seeks reconsideration of that part of the Commission's decision which granted special relief to Tel-America Corporation, licensee of Television Broadcast Station KAIL (Spanish language, Channel 53) Fresno, California, by denying the cable television

system certification for carriage of KFTV. The Commission found that "based on the information before us...this attempt [by KAIL] to become a viable local Spanish language station could be destroyed by the carriage of another Spanish language station."<sup>1</sup>

3. Spanish International did not participate in the initial action. Section 1.106(b) of the Commission's Rules requires that one seeking reconsideration who was not a party to the initial proceeding "state with particularity the manner in which...his interests are adversely affected by the action taken, and...show good reason why it was not possible for him to participate in the earlier stages of the proceeding." In meeting this burden, Spanish International states that "it has long been recognized" that denying cable television carriage to a television broadcast station adversely affects that station, and that it was unaware of Tel-America's petition which sought deletion of Spanish International's Station KFTV from the Clovis and Madera systems. It states that KFTV is a "must carry" station<sup>2</sup> in both Clovis and [341] Madera,

<sup>1</sup>On November 22, 1974, the Commission extended authority granted KAIL to remain silent temporarily, until January 17, 1975.

<sup>2</sup>Section 76.61 of the Commission's Rules, as it relates to Section 76.63 provides for a cable television system located within the second fifty major television markets that:

(a) Any such cable television system may carry, or on request of the relevant [341] station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the system is located, in whole or in part....

\* \* \* \* \*

(4) Television broadcast stations licensed to other

[footnote continued]

because it is significantly viewed in all of Fresno County, and, in addition, that it is a "must carry" station in Clovis because Clovis is located within KFTV's specified zone and in Madera because KFTV's community of license (Hanford) and Madera are within the same television market (Fresno). To establish that KFTV is significantly viewed in Fresno County, Spanish International has submitted a survey conducted among 460 Spanish-surnamed households in Fresno, Madera, and Tulare counties from February 18, to March 15, 1974. Spanish International asks that waiver be granted to the extent that the survey fails to satisfy the requirements of Section 76.54 of the Rules.<sup>3</sup> In further

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designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Kentucky television market).

(5) Commercial television broadcast stations that are significantly viewed in the community of the system. See §76.54.

<sup>3</sup> §76.54 Significantly viewed signals; method to be followed for special showings:

(a) Signals that are significantly viewed in a county (and thus are deemed to be significantly viewed within all communities within the county) are those that are listed in Appendix B of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order* (Docket 18397 et al.), FCC 72-530.

Since KFTV is not listed in Appendix B as being significantly viewed in Fresno County, it may establish its status pursuant to Sections (b) and (c):

(b) On or after March 31, 1973, significant viewing in a cable television community for signals not shown as significantly viewed under paragraph (a) of this section may be demonstrated by an independent professional audience survey of non-cable television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September. If two surveys are

[footnote continued]

support of its petition for reconsideration, Spanish International states that it has abandoned satellite status and is now supplying locally originated Spanish language programming.<sup>4</sup>

4. Given the change in circumstances, we believe that partial grant of Spanish International's petition for reconsideration is in the public interest. Our action in the initial proceeding was based upon KFTV's status as a satellite station, not originating local programming, and was designed to protect the struggling "local" Spanish language station (KAIL) from competition by another Spanish language station (KFTV) whose carriage was not mandatory. Now, however, KFTV, as a television broadcast station within whose specified zone

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taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing level. If surveys are taken for more than two weekly periods in any 12 months, all such surveys must be submitted and the combined surveys must result in an average figure at least one standard error above the required viewing level.

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community is located, in whole or in part, and on all cable systems, franchisees, and franchise applicants in the cable community at least thirty (30) days prior to the initial survey period. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

<sup>4</sup> Station KFTV's Annual Programming Report (FCC 303-A) indicates that local programming represents 231 minutes, or 7.6 percent, of its total weekly programming.



the city of Clovis is located,<sup>5</sup> is asserting its mandatory carriage rights on the Clovis system, pursuant to Section 76.61(a)(1). We will therefore require its carriage, and we will amend the certificate of compliance for the Clovis cable television system accordingly. However, we reject [342] Spanish International's contention that the signal is entitled to mandatory carriage on the Madera system. Madera is located 48.79 miles from Hanford, clearly beyond KFTV's 35 mile specified zone. And even though Hanford and Madera are both within the Fresno Market, only television broadcast stations "licensed to other designated communities within the same major television market" are accorded "must carry" status; Hanford is not such a designated community.<sup>6</sup> We recognized in the *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 170 (1972) at n. 37 that various audience rating services recognize different communities as being in the same hyphenated markets but stated that our new rules designate specifically the hyphenated major markets for cable television purposes. The smaller Hanford market is not hyphenated with the major Fresno market in Section 76.51 of the Rules. Nor do we believe it appropriate to accept Spanish International's market survey as establishing that KFTV is significantly viewed. The survey contains no indication that it was confined to non-cable television homes; the weekly periods during which the survey was conducted were not taken

<sup>5</sup>Clovis is 34.08 miles from Hanford. A station's specified zone is defined in Section 75.5(f) as "extending 35 air miles from the reference point in the community to which the station is licensed. . . ."

<sup>6</sup>A "[d]esignated community in a major television market" is defined at Section 76.5(h) of the Rules as "[a] community listed in §76.51."

thirty days apart; the survey expressly states that "[e]rrors in measurement cannot be computed for the measurements in this survey"; and no notice of the survey was provided to the necessary parties. While we have previously permitted certain minor deviations from the requirements of Section 76.54,<sup>7</sup> we will not grant its blanket waiver. In these circumstances, KFTV has no mandatory carriage rights on the cable system at Madera, and we will deny its request for carriage.

5. Pappas Television, Inc., seeks reconsideration of that part of *Fresno Cable TV, supra*, which granted certification for carriage of Television Broadcast Stations KTVU (Ind., Channel 2) Oakland, California and KTXL (Ind., Channel 40) Sacramento, California. In the alternative, Pappas requests that the Commission "conduct a hearing on the question of lost or diminished local independent television service." In support of its petition, Pappas makes the following arguments:

(a) Since the Commission, with all its expertise, has been unable to determine the precise impact "distant" signal importation by cable television systems has on "local" television broadcast stations, it is placing an impossible burden on Pappas to state with precision what further losses will result if the two independent stations are carried. Pappas has met its burden of proof in showing that it is already suffering substantial losses, and therefore cannot withstand any impact; moreover, the Commission has not clearly articulated the showing that a television broadcast station must make to prevent market penetration by "distant" signals, nor did it inform Pappas of the deficiencies in its original showing.

<sup>7</sup>See, e.g., *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116 (1974); *Cablevision of Marlow, Inc.*, FCC 73-1273, 44 FCC 2d 257 (1973).



(b) The Commission appears to place on Pappas a "novel and improper burden" of showing that cable service will be viable without the proposed signals. If cable systems cannot become [343] viable through various nonbroadcast services, "the loss to the public of such services is far less than the loss to the whole public of local broadcast service."

(c) In not processing all of Fresno Cable's applications for its conglomerate systems together, the Commission has failed to follow its own precedent and has failed to reach the question of the cumulative impact that carriage of the distant independent stations will have on KMPH.

(d) Denying relief to KMPH is inconsistent with that part of the decision which grants relief to KAIL, "an extremely vulnerable UHF station that has suffered continuing losses".

(e) Pappas's [sic] request for relief may not be denied without a hearing since it involves a question of destructive competition from television stations whose signals are imported by cable. *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (1958); *Folkways Broadcasting v. FCC*, 375 F.2d 299 (1967).

6. In its reply to Pappas's [sic] petition, Fresno Cable states that the Commission's carriage rules are designed to operate on a "go, no-go" basis, and that no deviation from this standard will be made without a substantial showing, specific and factually supported, that injury to the public will result if carriage is permitted. According to Fresno Cable, no showing of the amount of audience KMPH will lose if the distant signals are carried, the consequent loss in advertising revenue, and the effect on programming, particularly news and public affairs, has been made, and the losses currently being suffered are to be expected in the initial operations of

independent UHF stations. Fresno Cable further contends that no hearing prior to denial of the requested relief is necessary, since Pappas has failed to establish that KMPH will suffer a loss or degradation of service to the public. Pappas states, in reply, that precise impact measurements or specifications of programs to be affected are not required, and that the "go, no-go" standard cannot apply where local service in fact is threatened.

7. We do not find Pappas's [sic] request for reconsideration persuasive for the following reasons:

(a) (e) In our initial decision, we quoted from paragraphs 112 and 113 of the *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 187-87 (1972) and from *Gerity Broadcasting Co.*, FCC 72-651, 36 FCC 2d 69 (1972) to reiterate the standard which a television broadcast station must satisfy to limit cable television signal carriage to less than the complement we had found, after much study and experience, necessary to promote the orderly integration of cable television into the national communications structure. That standard requires that a station make a substantial showing, containing specificity of fact, that the proposed cable television service will adversely affect the station's revenues and its ability to serve the public interest. See also Paragraph 91, *Cable Television Report and Order*, *supra*, at p. 179. Pappas states in its pleadings that "[a]lthough KMPH did not present statistics as to how many viewers of its station would choose independent station programming from distant stations... and did not state [344] how many rating points, advertisers, and advertising dollars would be lost to it if distant signals were carried, such precise statistics are not necessary here where KMPH is already operating at a loss." Yet, before we will

handicap a new cable television system by denying it "the minimum amount of new service needed to attract large amounts of investment capital for the construction of new systems . . . to open the way for the full development of cable's potential"<sup>8</sup> it is precisely this sort of information, contained in an economic projection, that is necessary. Absent the detailed, factual information, which Pappas has deemed unnecessary, its contentions again must be dismissed as speculative and unsubstantiated.<sup>9</sup> *Spectrum Cable Systems, Inc.*, FCC 73-257, 40 FCC 2d 1019, *recons. denied*, FCC 73-1342, 44 FCC 2d 867 (1973), *app. pending sub nom. Springfield Television Broadcasting v. FCC*, cases number 74-1214 and 74-1217 (D.C. Cir.).<sup>10</sup> For the same reasons we do not believe Pappas has met the threshold showing necessary to require a hearing. See *Wheeling Antenna Co. v. United States*, 391 F.2d 179 (4th Cir. 1968).

(b) We stated in the *Cable Television Report and Order*, *supra*, at paragraph 112, that before restricting cable television systems to less than the number of signals we believe necessary to achieve viability, there would have to be a clear showing that the restriction would not be inconsistent with our goal of achieving

<sup>8</sup> Paragraph 90, *Cable Television Report and Order*, *supra*, at p. 178.

<sup>9</sup> We again note that both of the cable television systems are more than eight miles outside KMPH's specified zone.

<sup>10</sup> See also *King Video Cable Co.*, FCC 74-988, \_\_\_\_\_ FCC 2d \_\_\_\_\_ (1974); *Multi-Pix, Inc.*, FCC 74-743, 47 FCC 2d 1138 (1974); *Cable Antenna Systems*, FCC 74-646 FCC 47 2d 343 (1974); *Community Television of Montana, Inc.*, FCC 74-231, 45 FCC 2d 826 (1974); *Monroe All-Channel Cablevision, Inc.*, FCC 74-200, 45 FCC 2d 764 (1974); *Community TCI of Missouri, Inc.*, FCC 74-95, 45 FCC 2d 133 (1974); *Valley Cable Vision, Inc.*, FCC 73-1246, 44 FCC 2d 232 (1973); *See-Mor Cable TV of Sikeston, Inc.*, FCC 73-796, 42 FCC 2d 261 (1973); *Fort Smith TV Cable Co.*, FCC 73-151, 39 FCC 2d 573 (1973).

the orderly integration of cable television service into the national communications structure. The strong presumption that this integration cannot take place without "distant" independent signals must prevail over Pappas's speculative statements that the proposed cable television service would be inimical to the public interest.

(c) Consolidation of certificate of compliance applications is a matter of Commission discretion. *Lake County Cable TV, Inc.*, FCC 73-927, 42 FCC 2d 952 (1973). While elements of the Clovis and Madera applications are in common with other pending applications for the San Joaquin Valley, the other applications also present different issues. Moreover, our interests in the orderly and economical conduct of the Commission's business generally requires that applications be processed in the order filed. Several of the applications were filed more than a year apart, and we do not believe consolidation, in this instance, would serve the public interest. Regarding cumulative impact, Pappas has always had the option of arguing that the cumulative effect of granting the subject applications and other potential grants would be severe. Such a showing has not been made.

[345] (d) The relief granted KAIL, modified in this decision, was designed to protect a specialized Spanish language station against competition from a satellite broadcasting in the same language. We have limited that protection to KAIL's market, as defined by its specified zone, pursuant to paragraph 23 of the *Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326, 335 (1972).<sup>11</sup>

<sup>11</sup> Paragraph 23 states, in part, that: "We are attempting to encourage the carriage of foreign language programming. Where there is a local Spanish language station, it will, of course, get carriage priority."

However, we rejected the station's request that Fresno Cable be precluded from carrying the "distant" independent signals.

We are not without concern for KMPH's losses and attempts to succeed.<sup>12</sup> In our initial decision, we relaxed the requirements of Section 76.54 of the Rules to enable the station to more easily establish that it is significantly viewed and entitled to "must carry" status in Fresno County. However, we do not believe that the station would be significantly aided or that the public interest would be served by our imposing severe restrictions on cable television systems located outside of KMPH's specified zone.

In view of the foregoing, the Commission finds that partial reconsideration of its decision in *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116 (1974) is in the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed by Spanish International Communications Corporation, licensee of Station KFTV, IS GRANTED, to the extent indicated in paragraph 4, above, and in all other respects, IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Partial Reconsideration" and "Reply," filed by Pappas Television, Inc., licensee of Television Broadcast Station KMPH, ARE DENIED.

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<sup>12</sup>Examination of KMPH's most recent confidential financial report indicates, however, a substantial improvement in its cash flow.

IT IS FURTHER ORDERED, That the "Opposition of Fresno Cable TV Co.," proposed operator of cable television systems at Clovis and Madera, California, IS GRANTED, to the extent indicated above, and in all other respects IS DENIED.

Federal Communications Commission,  
Vincent J. Mullins, *Secretary*.

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[57 F.C.C.2d 134]

F.C.C. 75-1373

[134] **BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In Re Applications of	)	
Fresno Cable Television	)	
Company, Inc., Fresno,	)	
California	)	CAC-01831,
	)	CA565, CSR-333
Fresno Cable Television	)	CAC-01896,
Company, Inc. Specified	)	CA366
Unincorporated Areas of	)	
Fresno County, California	)	
For Certificates of Compliance	)	

**MEMORANDUM OPINION AND ORDER**

(Adopted: December 16, 1975; Released:  
December 31, 1975)

**BY THE COMMISSION: COMMISSIONER QUELLO  
CONCURRING IN THE RESULT.**

1. Fresno Cable Television Company, Inc., (hereinafter Fresno Cable) has filed the above-captioned applications for certification to commence cable television operations at the City of Fresno and in unincorporated portions of Fresno County adjacent to the cities of Fresno and Clovis, California.<sup>1</sup> Fresno

<sup>1</sup> All of the areas to be served are located within the specified zone of the Fresno, California, major television market (#72). Fresno has a population of 165,972 (1970 census).

Cable proposes to offer subscribers the following television broadcast signals:

KAIL<sup>2</sup> (Ind., Channel 53 ) Fresno, California  
KFSN-TV (CBS, Channel 30) Fresno, California  
KJEO (ABC, Channel 47) Fresno, California  
KMJ-TV (NBC, Channel 24) Fresno, California  
KFTV (Span. Lang., Channel 21) Hanford, California  
KTVU (Ind., Channel 2) Oakland, California  
KTXL (Ind., Channel 40) Sacramento, California  
KQED (Educ., Channel 9) San Francisco, California

Carriage of these signals is consistent with Section 76.63 of the Commission's Rules. Both of the applications are opposed by Pappas Television, Inc., licensee of Television Broadcast Station KMPH (Ind., Channel 26) Tulare, California.<sup>3</sup> In addition, Capital Cities Broadcasting Corporation, licensee of Station KFSN-TV (CBS, Channel 30), Fresno, California, has filed a "Petition for Special Relief" directed against the application for the City of Fresno, San Joaquin Cable TV, an applicant for a franchise from the City of Fresno, has filed comments and various other pleadings relating to the application for the City of Fresno.

[135] 2. In its opposition, Pappas states that the applications are procedurally defective in that 1) Fresno Cable has not assured that separate access channels will be provided to each community, as required by Section 76.251 of the Rules; 2) Fresno Cable's equal

<sup>2</sup> Currently dark.

<sup>3</sup> Camellia City Telecasters, Inc., licensee of Television Broadcast Station KTXL (Ind., Channel 40) Sacramento, California, also filed, but subsequently withdrew, objections to both applications.



employment policy statement is inadequate; and 3) its affidavit of service is unverified. Substantively, Pappas requests that certification be conditioned upon carriage of KMPH and non-carriage of any other distant independent television station. In support of this request, Pappas argues that while Fresno is located beyond the specified zone of the Tulare television market, KMPH nonetheless casts a predicted Grade A signal over Fresno and therefore is a "local station" having an affirmative obligation to serve the community and a concomitant right to be carried. Moreover, states Pappas, the unique and competitive nature of the Fresno market, coupled with the financial insecurity of KMPH, warrants Commission action insulating that station from competition by the distant independent signals Fresno Cable proposes to import. The dilution in audience strength that would be caused by this competition would only serve to aggravate KMPH's already precarious position, avers Pappas, and would delay the time at which the station could commence significant local program production. Pappas states that many other communities within its predicted Grade A contour either have or soon will have cable systems carrying imported independent signals, and that "[e]ven without precise impact statistics, only one conclusion can be drawn from this pattern of CATV development in Station KMPH's service area: a new independent television station already operating on the financial edge will be adversely affected. . . ."

3. In its "Petition for Special Relief," Capital Cities Broadcasting Corporation requests that an order be issued to prohibit the importation of any signal "neither local to the Fresno market nor significantly viewed" in Fresno County. Capital Cities states that the

Fresno market is unique among second-fifty major television markets in the number of competing television stations; that the rationale underlying the second-fifty carriage rules (Section 76.63) fails since the market is served by as many independent as network stations; that it is confronted with a "plainly formidable task" in attempting to achieve the audience share necessary to become viable; and that the exclusivity protection afforded to stations in the second-fifty markets by Section 76.151 of the Rules is not sufficient to protect it.

4. In reply, Fresno Cable, addressing the procedural arguments of Pappas, states: (1) that separate access channels will be offered for each area; (2) that the equal employment statement is adapted from the standard program used by Fresno Cable's parent, and the word "station" was inadvertently retained in some instances; and (3) that Pappas does not contend that it was not served with copies of the application. Turning to the substantive issues, Fresno Cable states that: (1) Pappas and Capital Cities have failed to meet the substantial burden imposed on those seeking "ad hoc modification of the Commission's signal carriage Rules"; (2) the Fresno market is not unique since the second independent station, KAIL, operates only 30 hours per week with an authorized power of 16.1 kw visual and 2.14 kw aural; (3) the Commission expressly declined to limit signal carriage in second-fifty markets when it adopted the syndicated program exclusivity [136] rules (Section 76.151); (4) in comparison to other UHF stations, KMPH and KFSN-TV appear to be doing quite well; (5) Commission adoption of Pappas's proposal would preclude cable television development in all markets where a UHF station is losing money; and (6)

the Commission has concluded that two signals not otherwise available in the community are the minimum amount of new service needed to attract large amounts of investment capital for construction of new cable systems.

5. Pappas's procedural arguments are without merit. Fresno Cable's employment statement is in compliance with Section 76.311 of the Rules, and Section 76.13(a)(6) only requires that an applicant submit a certificate of service. Turning to the signal carriage issues, we note that we have previously considered the competing interests in detail. In *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116, *recons. granted in part*, FCC 74-1396, 50 FCC 2d 340 (1974), *stay denied*, FCC 75-360, 52 FCC 2d 249 (1975),<sup>4</sup> and in *Hanford Cable Co.*, FCC 74-844, 48 FCC 2d 132 (1974), *recons. granted in part*, FCC 74-1395, 50 FCC 2d 351 (1974),<sup>5</sup> we found that KMPH was in need of some relief. Accordingly, we waived portions of Section 76.54 of the Rules to enable the station to establish its status as significantly viewed in Fresno County more easily. We stated that Pappas should submit the certified results of all independent professional audience surveys used to demonstrate viewing strength, and that "[i]f, upon review of those results, we find KMPH is 'significantly viewed' in a county [i.e., that the station has a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent in that county], we will afford the station mandatory signal carriage rights on all cable systems

<sup>4</sup> *App. pending sub nom. Pappas Television, Inc. v. FCC & USA*, Civil No. 75-1116 (D.C. Cir. filed February 11, 1975).

<sup>5</sup> *App. pending sub nom. Pappas Television, Inc. v. FCC & USA*, Civil No. 75-1115 (D.C. Cir. filed February 11, 1975).

operating or proposing to operate in that county." Pappas has submitted surveys which satisfy our criteria and establish that KMPH is significantly viewed in several counties, including Fresno.<sup>6</sup> The station is, therefore, a "must carry" pursuant to Section 76.61(a) (5) of the Rules, and we will sua sponte waive the procedural requirements of Sections 76.18 and 76.25 and require Fresno Cable to add KMPH to its proposed signal carriage complement without requiring further public notice. *Compare New Worlds Cable TV, Inc.*, FCC 75-332, 52 FCC 2d 301 (1975).

6. We will not, however, preclude Fresno Cable from carrying "distant" independent signals consistent with our Rules. As stated in *Fresno Cable TV Co., Inc.*, and *Hanford Cable Co.*, *supra*, parties seeking to impose restrictions upon carriage of otherwise permissible signals are faced with a substantial burden; absent a "substantial showing," we will not deviate from the "go, no-go" concept of the carriage rules. Clarifying these points, we held that any showings must contain specificity of fact and demonstrate that the proposed cable television service will adversely affect the station's revenues to an extent that impairs its ability to serve the public interest. Without such precise impact statistics, we are reluctant to handicap a new cable television system by denying it "the minimum amount of new service [137] needed to attract large amounts of investment capital for the construction of new systems . . . to open the way for the full development of cable's potential." Paragraph 90, *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 178 (1972). Each station shows a steadily improving financial posture, and since neither Pappas nor Capital

<sup>6</sup> *Pappas Television, Inc.*, FCC 75-221, 51 FCC 2d 745 (1975).



Cities has timely submitted the requisite detailed impact analysis, their requests will be denied.<sup>7</sup>

7. The franchise for portions of Fresno County (CAC-01896) was issued in 1968, and varies from the standards of Section 76.31 as follows: while the franchise itself does not indicate that it was awarded in a full public proceeding affording due process, a letter from Robert M. Wash, County Counsel, assures that it was; the franchise provides for a twenty year term, but our certification will only extend until March 31, 1977; the franchise does not state that rate increases will only be approved in public proceedings, but the applicant assures us that no rate increases will be made except after such a proceeding; the franchise does not set forth service procedures, but Fresno Cable avers that it will maintain a local office with competent employees and will correct malfunctions "as soon as possible." Finally, the franchise requires a fee of 5% of gross subscriber receipts or \$5,000, whichever is greater, for the first year of operation, and \$5,000 or 5-1/2% of gross receipts subsequently. Only substantial compliance with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, and, measured by the criteria established by *CATV of Rockford, Inc.*, FCC 72-1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73-293, 40 FCC 2d 493 (1973), we find that the franchise substantially complies with Section 76.31 of the Rules in a manner sufficient to

<sup>7</sup>On November 26, 1975, Pappas submitted the "Cooper Study," which purports to analyze the impact of two imported independent stations on KMPH's revenues. Because the study was filed more than two and one half years after the pleading cycle on the impact issue had been completed it will not be considered in this proceeding. However, since it addresses the entire Fresno area of dominant influence, it will be treated separately as a petition for special relief.

justify a grant of the application until March 31, 1977.<sup>8</sup>

8. The franchise for the City of Fresno (CAC-01831) initially required a payment of \$50,000 to the City by the cable system "in consideration of the granting of this franchise." Further, Fresno Cable was required to pay \$20,000 the second franchise year and \$30,000 (or 5-1/2% of gross receipts) for the third year, and each year thereafter (reduced by the City Council in 1969 to \$10,000 after the third franchise year). Since a total of \$155,000 in the nature of a lump sum payment was remitted to the City before operations commenced, the applicant was required to explain to the Commission how the amount paid is in substantial compliance with the terms of Section 76.31(b) of the Rules<sup>9</sup> or, in the alternative, to submit a franchise consistent with the requirements of Section 76.31. On August 11, 1975, Fresno Cable forwarded a copy of Ordinance No. 75-81, designated as the Cable [138] Television Ordinance of the City of Fresno, and amendments to the original franchise which incorporate the new ordinance. Shortly thereafter, it forwarded a copy of an agreement between it and the City wherein the City

<sup>8</sup>The franchise also sets technical standards and, at Section 8 ("Uses Permitted"), states "This license shall not be construed as a... permit to transmit any special program... in the manner commonly known and referred to as 'paid television....'" The Commissioner, however, has preempted both areas. See *Report and Order in Docket 20018*, FCC 74-1168, 49 FCC 2d 470 (1974); and *Lake County Cable TV, Inc.*, FCC 73-927, 42 FCC 2d 952 (1973).

<sup>9</sup>That Section provides, in pertinent part, that:

(b) The franchise fee shall be reasonable (e.g., in the range of 3-5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)).



agrees to return the \$155,000 "[w]ithin sixty (60) days following the commencement by Grantee of CATV service to one or more subscribers in the City of Fresno. . . ."

9. On September 11, 1975, San Joaquin Cable TV (San Joaquin), "an interested party in this matter by virtue of the fact that it is an applicant for a cable television franchise from the City of Fresno," filed "Comments Concerning Amendment to Application." In its comments (and its later supplements), San Joaquin contends that: 1) The permittee of translator K59AE, Fresno, and the permittee of Television Broadcast Station KMTF, Fresno, have not been served pursuant to Section 76.13(a)(6), nor has Fresno Cable indicated an intention to carry the latter; 2) Not all of the "franchise documents" mentioned in Section 1 of the franchise amendment have been submitted for Commission inspection, as required by paragraph 55 of the *Clarification of Rules and Notice of Proposed Rule Making*, FCC 74-384, 46 FCC 2d 175, 191 (1974); 3) The substantially amended franchise is not in strict compliance with the provisions of Section 76.31 in that:

(a) there is no evidence that the amendment was made in a full public proceeding affording due process, nor does it appear that the City has approved the various transfers of ownership of Fresno Cable or the financial qualifications of the present owners, and this is necessary since the substantial amendments completely terminated the old franchise;

(b) even if portions of the franchise are found to be preempted by the Commission, Fresno Cable remains contractually bound, pursuant to ordinance Section 6-216(a), contrary to the Commis-

sion's policy as stated in paragraph 55 of the *Clarification, supra*:

(c) Fresno Cable is required to disclose rates it may charge for specialized programming, which "has an inhibiting [effect] on the system's freedom of activity in these areas";

(d) Section 6-205(c)(3) of the ordinance enforces technical standards, in violation of the preemption announced in *Report and Order in Docket No. 20018*, FCC 74-1168, 49 FCC 2d 470 (1974);

(e) Section 6-216(b) states only that Commission amendments to Section 76.31 may, in the Council's discretion, be incorporated into the franchise (while Section 76.31(a)(6) requires that the amendments shall be so incorporated);

(f) Section 6-212 appears to permit City regulation of all rates;

(g) the franchise requires a free government channel beyond the five year limit established by the Commission; and

(h) the promise by the City to repay the \$155,000 is conditional.

Finally, San Joaquin states that it has applied for a franchise from the City which it will forward when granted. It notes that it has filed an application for certificate of compliance with the Commission and requests that its application be acted upon simultaneously with Fresno Cable's since "the bulk of applicant's franchise is now before the Commission [in the form of the City's new ordinance]," and states that [139] failure to do so, in the event the City grants a franchise, "would give Fresno Cable an unfair competitive advantage, inconsistent with the City's decision to grant a franchise to both parties."

10. Pappas also has responded to the amendments. It states that since fundamental changes in the ordinance were made, the City was obligated to solicit new applications and to allow "the public as well as prospective applicants an opportunity to participate in the awarding of the new and more attractive franchise." It argues that the failure to do so was discriminatory, citing *Springfield Television, Inc. v. Springfield Mo.*, 462 F.2d 21 (8th Cir. 1972). It states that the 1966 franchise was non-exclusive while an amendment now provides that "competitive franchises covering the same territory shall be restricted to those instances where the applicant for the second franchise can offer a unique or legally protected service which is not available and cannot be made available to the grantee of the existing franchise."

11. In reply, Fresno Cable recites the lengthy history of its attempts to begin cable service at Fresno. It states that in December 1966, it filed, pursuant to former Section 74.1107,<sup>10</sup> a petition for waiver of the evidentiary hearing mandated by that Rule. The request was denied, and a hearing was designated (*Fresno Cable*

<sup>10</sup>That Section provided, in pertinent part, that:

No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. . . .

*TV Co., Inc.*, FCC 68-401, 12 FCC 2d 338 (1968)). Before the hearing commenced, however, the Commission suspended all pending top-100 market hearings pursuant to *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18297*, FCC 68-1176, 15 FCC 2d 417 (1968), and the proceeding was terminated on July 31, 1972. Fresno Cable applied again, this time under new rules, but, in response to a Commission inquiry, was unable to establish that the large lump-sum payments made to the City were within the established zone of "substantial compliance" with Section 76.31(b). The City therefore instituted proceedings looking to the adoption of franchise documents fully consistent with the Commission's standards, which culminated in the new ordinance and amended franchise. Fresno Cable contends that Pappas's involvement in the franchise issue is improper since KMPH is not licensed to a community within the Fresno market and, indeed, is more than 35 miles from Fresno; that the most recent amendments did not, in fact, result in a new franchise but merely an amended one; and that *Springfield Television, Inc.* is distinguishable. Finally, it states that the "other franchise documents" referred to in the franchise date back to 1966, and are neither relevant nor material to the application, but will be submitted if required.

12. Mr. R. W. Hanley, Chief Administrative Officer of the City of Fresno, has also replied to the oppositions. Mr. Hanley states that the amendments to the franchise were adopted after full public proceedings affording due process; that notices preceding their discussion in both the Council workshop of July 3, 1975, and the regular meeting of [140] July 31, 1975, were given in local newspapers; that copies of all



documents discussed were available in the City Clerk's office and that representatives of both San Joaquin Cable TV and Pappas Television participated. He further states that the City recognizes the broad scope of the Commission's regulatory authority over cable television, and that the City has "no intention of intruding into areas encompassed by the Commission's regulations and policies except to the extent allowed by law," as indicated by Section 6-216(a) of the ordinance. He states that the City will not bind Fresno Cable, contractually or otherwise, to provide services, equipment or operations inconsistent with Commission requirements; that it has no intention of regulating rates charged for specialized services; that it recognizes the Commission's preemption of technical standards; that it will incorporate into the franchise all Commission modifications of Section 76.31 which are mandatory, and that the operation of the government access channel will be in accordance with Commission requirements. Mr. Hanley concludes by saying "we respectfully request that the Commission find the city's ordinance sufficient to support the issuance of a certificate of compliance based thereon. Since 1966, Fresno Cable has been the party designated by the City of Fresno to operate a cable television system in this City, and we have recently reaffirmed our intention to honor that franchise."

13. None of the matters discussed by San Joaquin or Pappas preclude our awarding a certificate of compliance to Fresno Cable. We will address the arguments *seriatim*:

(1) David W. Wilkinson, present permittee of translator K59AE, and the Fresno County Board of Education, permittee of Television Broadcast Station

KMTF, were not awarded construction permits until long after Fresno Cable's application was filed. Accordingly, neither was entitled to service pursuant to Sections 76.13(a)(6) or 1.65. Fresno Cable is not required to request certification of KMTF since that station is a "must carry" only upon its request, and we are not aware that such a request has been made;

(2) We stated at paragraph 55 of the *Clarification, supra*, that we would review all franchise provisions that are enforceable against the franchisee for consistency with the Rules, including those incorporated by reference, "particularly for extra services or equipment." The "franchise documents" involved herein include nine items, most of which (The Notice Inviting Offers and Applications for CATV Franchise; The Instructions to Offeror—Applicants for CATV Franchise; The Form of Offer and Application for CATV Franchise; The Notice of Receipt by City; the Written Acceptance of CATV Franchise) date back to 1966. The City's purpose in adopting the new ordinance and deleting the old (including the regulations issued thereunder) was to bring the franchise into compliance with our Rules, and the City's Chief Administrative Officer emphasizes that intention. The City has not disputed Fresno Cable's contention that the documents which have not been forwarded are irrelevant for Commission purposes, nor has San Joaquin presented any evidence suggesting this is not the case. Nevertheless, out of an abundance of caution, we will expressly state our intention to treat as preempted any provision of the franchise [141] documents inconsistent with our Rules. See *Arlington Telecommunication Corp.*, FCC 75-670, 53 FCC 2d 757 (1975).

(3)(a) We will not repeat in full our often stated



expectations regarding the nature of our public proceeding requirement. See *Cablevision of Durham*, FCC 75-535, 52 FCC 2d 1128 (1975); *Lynchburg Cablevision, Inc.*, FCC 75-41, 50 FCC 2d 797 (1975); *Calvert Telecommunications Corp.*, FCC 74-1095, 49 FCC 2d 200 (1974). Suffice it to say that:

Our present requirement for public proceedings is administered on the basis of a "reasonable man" standard. So long as the public has been given a reasonable opportunity to participate in the franchising process, we currently consider our "public proceeding" requirement as having been met. We presume the regularity of action by local officials. Except in the extraordinary case, if local officials assure us that they have made appropriate investigations of the franchisee's qualifications and that the public has had an opportunity to participate in the process we will not delve further into the particular methodology or decision factors in any specific franchise grant. *Clarification, supra*, at paragraph 51.

The undisputed representations of Fresno's Chief Administrative Officer satisfy our requirements. Presumably any questions as to the qualifications of Fresno Cable's current owners would have been raised by San Joaquin's or Pappas's representatives and resolved at the public hearings. As to Fresno Cable's changed ownership, we have no requirement at this time that transfers of control be made only after full public proceedings.<sup>11</sup> But it would be difficult to view the statements of the Chief Administrative Officer and the act of substantially amending the old franchise as

<sup>11</sup>See paragraphs 80-81, *Clarification, supra*, at 198-99, in which the Commission stated that it had no firm rules in this area and invited comments (Docket No. 20023).

less than an endorsement of the present owners.<sup>12</sup> Finally, we note that this was not an *ab initio* award proceeding, but rather a proceeding involving amendment of an existing franchise. See *Central Plains Cable TV, Inc.*, FCC 75-266, 51 FCC 2d 904 (1975).<sup>13</sup>

(b) Section 6-216(a) of the franchise purports to make contractual in nature "any and all minimum standards governing the operation of the grantee and any and all maximum rates, ratios and charges," and as such contractually binding in the event of a subsequent federal or state preemption. However, in his letter, the Chief Administrative Officer specifically states the City's intention not to contractually bind Fresno Cable to services, equipment or operations inconsistent with the Rules. And while we find the provision potentially troublesome, any detailed analysis of its effect or application at this time, absent specific action by the City, would be conjecture;

(c) We do not find this requirement objectionable, especially since we have approved contingency clauses

<sup>12</sup>*Springfield Television*, cited by Pappas, is not relevant. There the court found that a cable television franchise ordinance could not be awarded pursuant to the City charter except after a vote by the City electorate. Pappas has not proffered a similar requirement in Fresno's charter. Moreover, we do not agree that the new franchise ordinance is necessarily exclusive. The City is apparently considering San Joaquin's application and the latter, obviously, does not believe its efforts are in vain.

<sup>13</sup>On December 9, 1975, San Joaquin notified the Commission that a suit had been filed in the Superior Court of California for Fresno County challenging the validity of the amendments made to Fresno Cable's franchise. The fact that such suit is pending does not alter our presumption of regularity which attaches to acts by the franchising authority. Our treatment of the amendments as valid is, of course, subject to any subsequent judicial determination to the contrary. See *Cable Antenna Systems*, FCC 74-646, 47 FCC 2d 545 (1974).

in franchises whereby the franchising authority may apply its fee against income from specialized [142] services should the Commission alter its present policy (See *Clarification, supra*, at part. 97);

(d) That section merely requires the franchise to describe its proposed system and, as a minimum standard, to comply with the requirements of the Commission's technical standards;

(e) We believe the statements of the Chief Administrative Officer assure that any necessary franchise changes will be made;

(f) That section requires council approval of all rates and charges. It will be treated as preempted to the extent it applies to other than fees from ordinary subscriber services. See *Clarification, supra*, at paras. 84, 85.

(g) We do not believe this provision is inconsistent with Section 76.251(a)(10) since both require a free government channel for five years. The franchise expires December 31, 1979, and the requirement will be examined at that time for consistency with our Rules;

(h) When Fresno Cable begins serving subscribers, the money will be refunded. Should it not, for some reason, serve subscribers, the Commission's interest in the matter would end, since Fresno Cable would then not come within our definition of a cable system. See Section 76.5(a).

14. We do not believe any further delay in issuing Fresno Cable a certificate of compliance is in the public interest. Our general policy is to process competing applications simultaneously, but only where both are ripe for processing. See *Lake County Cable Communica-*

*tions*, FCC 73-927, 42 FCC 2d 952 (1973). We will not act on an application if local processes have not been completed. See *Telco Cablevision*, FCC 75-168, 51 FCC 2d 578 (1975). *Wells Cable TV*, FCC 75-216, 51 FCC 2d 607 (1975). In a letter to San Joaquin's president dated September 24, the Chief Administrative Officer advised that the franchising procedure "may be completed by November 30, 1975." On November 20, San Joaquin stated negotiations were proceeding apace, that it would know if it would receive a franchise by December 18, and that "the actual franchise may be before the Commission by the middle part of January."<sup>14</sup> Assuming a franchise is awarded and is forwarded for Commission inspection, we will act upon San Joaquin's application as rapidly as possible consistent with our other regulatory responsibilities. Fresno Cable on the other hand has submitted an amended franchise in strict compliance with Section 76.31 of the Rules, and its application is now ripe for grant. In these circumstances, we cannot withhold certification to Fresno Cable based on allegations of competitive economic disadvantage.<sup>15</sup>

In view of the foregoing, the Commission finds that grant of the above-captioned applications for certification is consistent with the public interest.

<sup>14</sup>The City Attorney has since advised that assuming the application is not rejected, "the earliest the public hearing could be held would be January 26, 1976." He offers the caveat that "[a]ctual processing time could be much longer...."

<sup>15</sup>This is not a case where the Commission is asked to waive strict compliance with one of the franchise standards so that a newly-franchised cable system may operate on equal footing with a "grandfathered" competitor. Compare, *Twin County Trans-Video*, FCC 75-93, 50 FCC 2d 1147 (1975); *A. N. Cable TV Company, Inc.*, FCC 73-830, 42 FCC 2d 291 (1973).

Accordingly, IT IS ORDERED, That the "Application[s] for Certification," filed by Fresno Cable Television Company, Inc., (CAC-01831, [143] 1896) ARE GRANTED, and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That the "Petition for Special Relief," (CSR-333) filed by Capital Cities Broadcasting Corporation, licensee of Station KFSN-TV (CBS, Channel 30) Fresno, California, IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to the Applications for Certificates of Compliance" and supplements thereto, filed by Pappas Television, Inc., licensee of Television Broadcast Station KMPH, (Ind., Channel 26) Tulare, California, IS DENIED.

IT IS FURTHER ORDERED, That the "Comments Concerning the Amendment to Application" and supplements thereto, filed by San Joaquin Cable TV, proposed operator of a cable television system at Fresno, California, ARE DENIED.

Federal Communications Commission,  
Vincent J. Mullins, *Secretary*.

[60 F.C.C.2d 198-201]

F.C.C. 76-649

[198] **BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In Re Applications of	)	
Fresno Cable Television	)	
Company, Inc., Fresno,	)	
California	)	CAC-01831,
	)	CSR-333
Fresno Cable Television	)	(CA0565)
Company, Inc., Specified	)	CAC-01896
Unincorporated Areas of	)	(CA0366)
Fresno County, California	)	CAC-05821
San Joaquin Cable TV, Inc.,	)	(CA0686)
Fresno, California	)	
For Certificates of Compliance	)	

**MEMORANDUM OPINION AND ORDER**

(Adopted: July 7, 1976; Released: July 20, 1976)

**BY THE COMMISSION: COMMISSIONER ROBINSON  
ABSENT.**

1. Pappas Television, Inc., licensee of Television Broadcast Station KMPH (Ind., Channel 26), Tulare, California, (hereinafter Pappas) seeks a stay of two Commission orders: *Fresno Cable Television Company, Inc.* (Fresno, California), FCC 75-1373, 57 FCC 2d 134 (1975) and *San Joaquin Cable TV, Inc.* (Fresno, California), FCC 76-444, 59 FCC 2d \_\_\_\_ (1976). Although the petitions were filed separately, they are worded in essentially identical language and request the



same relief. Accordingly, they will be considered jointly.

2. In *Fresno Cable* the Commission granted certificates of compliance to Fresno Cable Television Company, Inc. (hereinafter Fresno Cable) to operate cable television systems at Fresno, California, and at specified unincorporated areas of Fresno County surrounding Fresno. Included in the authorized signal complement were Television Broadcast Stations KTVU (Ind., Channel 2), Oakland, California, and KTXL (Ind., Channel 40), Sacramento, California, whose carriage was found to be consistent with Section 76.61(b) of the Commission's Rules. The Commission denied the objection of Pappas, finding that it had not submitted in a timely manner the detailed impact analysis required of one seeking to restrict cable carriage of signals consistent with the Rules. It noted that the "Cooper Study," which purports to analyze the [199] impact of two imported independent stations by cable systems in the Fresno area of dominant influence on KMPH's revenues, was filed more than two and one-half years after the pleading cycle on the impact issue had been completed and would not therefore be considered in the Fresno Cable certificating proceeding. However, it stated that since the petition addressed the entire area of dominant influence, it would be considered separately as a petition for special relief. Pappas filed a petition for review of the Commission's decision on January 6, 1976. *Pappas Television, Inc. v. FCC*, Civil No. 76-1010 (D.C. Cir., filed January 6, 1976). Subsequently, San Joaquin Cable TV, Inc., (hereinafter San Joaquin) perfected its pending application for certification to operate a cable television system at Fresno. Included therein was a request for certification

of the signals of Television Broadcast Stations KTVU (Ind., Channel 2), Oakland, California, and KBHK-TV (Ind., Channel 44), San Francisco, California. Pappas opposed the application, including in its opposition a request that the application be consolidated with the Cooper Study proceeding which, by this time, had been designated CSR-962 and was being processed as a petition for special relief. The Commission declined to consolidate the two proceedings. It found that by its own terms the Cooper Study is not limited to the City of Fresno, but speaks to and requests relief in the entire area of dominant influence. Since many of the cable systems in the area were participating in the special relief proceeding, causing various procedural delays, the Commission found that "withholding of certification to San Joaquin until the Commission completes its analysis of and makes determinations upon all the pleadings in that proceeding could place San Joaquin at a competitive disadvantage with previously-certified Fresno Cable." The Commission noted that San Joaquin would be subject to any relief afforded Pappas in CSR-962, and issued the requested certificate of compliance. Pappas appealed the Commission's decision in *Pappas Television v. FCC*, Civil No. 76-1494 (D.C. Cir., filed June 2, 1976).

3. In its petition for stay of *Fresno Cable*, Pappas states that the Commission's failure to consider the Cooper Study while granting authority for carriage of KTXL and KTVU denied Pappas a full and impartial hearing; that Pappas demonstrated that importation of distant independent signals would lead to curtailment of local service, thereby threatening it with immediate harm; that a "roll-back" of service that may result from the special relief proceeding is contrary to stated

Commission policy; that it is seeking to restrict carriage of only the distant independent signals pending judicial review; and that no competitive disadvantage will result since it is also opposing carriage of independent signals on San Joaquin's system. Pappas repeats the arguments in its petition for stay of *San Joaquin*.

4. In its "Opposition to Petition for Stay," Fresno Cable notes that Pappas did not file its petition for stay until five months after release of the Commission's decision and the filing of the petition for review. It states that such conduct amounts to laches, barring a grant of the requested relief. It contends that Pappas is not likely to prevail in its petition for review and that the Commission's refusal to consider the late-filed Cooper Study in Fresno Cable's certification proceeding was correct. To do otherwise, states Fresno Cable, would have been grossly [200] unfair and injurious. Moreover, no demonstration of economic injury is before the court of appeals, states Fresno Cable, since the attempted showing is contained in the Cooper Study, upon whose merits the Commission has not yet ruled; therefore, Pappas has not demonstrated irreparable injury.

5. San Joaquin has filed in opposition to Pappas's petition for stay of the Commission's decision in *San Joaquin Cable TV*. It states (a) a stay would adversely affect the public interest and San Joaquin since without distant independent signals, it might not be able to construct its system, and even if it constructs, the absence of such signals during its developmental stages when it is incurring substantial expenses would be particularly harmful; (b) Pappas will only prevail on the merits of its appeal if it is able to demonstrate that the Commission erred in failing to consolidate San

Joaquin's certificate application with CSR-962—the Cooper Study—a happening that is most unlikely; (c) it is evident that Pappas is not faced with irreparable injury since more than five months passed from the date of Commission certification of Fresno Cable to Pappas's filing of the petition for stay, and (d) a stay should be granted only in the most compelling circumstances, none of which have been documented by Pappas.

6. A fourfold showing is required before grant of a request for stay; the petitioner must demonstrate: (1) a likelihood of success on the merits of a petition for appeal; (2) failure to grant a stay would cause irreparable injury to the petitioner; (3) grant of the stay would not harm other interested parties; and (4) the stay would be in the public interest.<sup>1</sup> Pappas has not demonstrated a likelihood of success on the merits of its appeal. Fresno Cable's application was ripe for grant, and we do not believe the court of appeals would find the Commission's failure to consider a pleading filed more than two and one-half years late which would have substantially delayed that proceeding error, especially since the delay could have substantially prejudiced the rights of Fresno Cable. Similarly, since the Cooper Study does not direct its analysis to the City of Fresno, but instead speaks to the entire area of dominant influence, we do not believe the court would find our decision in *San Joaquin* to examine the matter in a special relief proceeding, with all affected parties being given a chance to be heard, improper, especially in view of the competitive situation in the City of Fresno.

<sup>1</sup>See *Fetzer Cablevision* (Kalamazoo, Michigan), FCC 75-261, 51 FCC 2d 933 (1975).



7. Moreover, Pappas has not demonstrated irreparable injury if a stay is not granted. We expressly stated in *San Joaquin* that the cable system would be subject to any relief afforded Pappas in the special relief proceeding. In the event that either or both cable systems are constructed and operational prior to the resolution of that matter, with any necessary microwave arrangements completed, and the system decides to carry the distant independent signals, such action is taken at its own risk. To state the obvious, our action herein in no way limits the relief, if any, we may provide Pappas after our analysis of the matters raised in CSR-962 is completed. Finally, the grant of a stay at this point would only serve to reward Pappas's dilatory conduct in [201] *Fresno Cable, supra*, and we do not believe such action would be in the public interest.

In view of the foregoing, the Commission finds that grant of the subject petitions for stay would not be in the public interest.

Accordingly, IT IS ORDERED, That the subject "Petition[s] for Stay," filed by Pappas Television, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Petition for Stay," filed by San Joaquin Cable TV, Inc., IS GRANTED, to the extent indicated herein, and otherwise IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Petition for Stay," filed by Fresno Cable Television Company, Inc., IS GRANTED, to the extent indicated herein, and otherwise IS DENIED.

Federal Communications Commission,  
Vincent J. Mullins, *Secretary*.

[59 F.C.C.2d 525-530]

F.C.C. 76-444

[525]

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In Re Application of	]	
SAN JOAQUIN CABLE TV,	]	
INC., FRESNO, CALIFORNIA	]	CAC-5821
For Certificate of Compliance	]	(CA0686)
	]	

# MEMORANDUM OPINION AND ORDER

(Adopted: May 12, 1976; Released: May 26, 1976)

BY THE COMMISSION: COMMISSIONER REID  
ABSENT; COMMISSIONER WASHBURN CONCUR-  
RING IN THE RESULT.

1. San Joaquin Cable TV, Inc. (hereinafter San Joaquin) has filed the above-captioned application for certification to commence cable television operations at the City of Fresno, California.<sup>1</sup> San Joaquin proposes to offer subscribers the following television broadcast signals:

KMFT (C.P., Channel 18) Fresno, California  
KFSN-TV (CBS, Channel 30) Fresno, California  
KJEO (ABC, Channel 47) Fresno, California  
KMJ-TV (NBC, Channel 24) Fresno, California  
KAIL<sup>2</sup> (Ind., Channel 53) Fresno, California

<sup>1</sup>The Fresno major market is ranked number 72; the City has a population of 165,972 (1970 census). The cable system will have 27 channels available immediately, and a technical capacity for 38.

<sup>2</sup>KAIL was granted permission to cease transmission temporarily by the Commission on April 17, 1973. The permission expires June 29, 1976.



KMPH (Ind., Channel 26) Tulare, California  
 KFTV (Spec. Sta., Channel 21) Hanford, California  
 KBHK-TV (Ind., Channel 44) San Francisco, California  
 KEMO-TV (Spec. Sta., Channel 20) San Francisco, California  
 KQED (Educ., Channel 9) San Francisco, California  
 KTVU (Ind., Channel 2) Oakland, California  
 KVIE (Educ., Channel 6) Sacramento, California

Carriage of these signals is consistent with Section 76.63 of the Commission's Rules. The application is opposed by Pappas Television, Inc., licensee of Television Broadcast Station KMPH (Ind., Channel 26), Tulare, California; by Spanish International Communications Corporation, licensee of Station KFTV (Spec. Sta., Channel 21), Hanford, California; by Television Broadcast Station KAIL (Ind., Channel 53), Fresno, California; and by Fresno Cable Television Co., Inc., recently certified by the Commission to operate cable television systems at Fresno and specified unincorporated portions of Fresno County.

2. In its opposition, Pappas states that San Joaquin must not be permitted to import distant independent signals into Fresno since KMPH is dependent upon audience in Fresno and is unable to withstand the competition the independent signals will pose. In support of this contention, Pappas states: a) the Fresno market is a unique sec-[526]ond-fifty market in that six commercial stations place City-Grade signals over Fresno; b) the Commission's continuing concern for the development of UHF stations was evidenced by its recent decision in *Daily Telegraph Printing Company*, FCC 75-1302, 56 FCC 2d 990 (1975), in which it declined to permit a VHF station to relocate its transmitter on grounds of

economic injury to a UHF station; c) San Joaquin's cable system will be successful by providing improved reception, origination programming, access programming, and pay cable, without the distant independent signals; d) the Cooper Study, submitted with Pappas's opposition, establishes "that importation of two distant independent signals will cause a decrease in KMPH's actual revenues of between 11.7% and 13.9%."

3. In its reply to Pappas's petition, San Joaquin states that in *Fresno Cable Television Company, Inc.* (Fresno, California), FCC 75-1373, — FCC 2d — 1975, the Commission granted a certificate of compliance to Fresno Cable Television Company to operate cable television systems at Fresno and surrounding portions of Fresno County. Therein, the Commission refused to consider the Cooper Study, instead deferring it for separate consideration in a special relief proceeding (CSR-962) "since it addresses the entire Fresno area of dominant influence," and authorized Fresno Cable to carry, *inter alia*, two distant independent signals.<sup>3</sup> To delay action on San Joaquin's application to consider the Cooper Study in the instant proceeding, states San Joaquin, could give Fresno Cable an insuperable competitive advantage, greatly harming San Joaquin, while Pappas would not be harmed by separate consideration. In any

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<sup>3</sup> In the cited opinion the Commission stated as follows: On November 26, 1975, Pappas submitted the "Cooper Study," which purports to analyze the impact of two imported independent stations on KMPH's revenues. Because the study was filed more than two and one half years after the pleading cycle on the impact issue had been completed it will not be considered in this proceeding. However, since it addresses the entire Fresno area of dominant influence, it will be treated separately as a petition for special relief. *Id.* at n. 7.

event, states San Joaquin, it should not be denied carriage of imported independents since such signals are vital to its success in that origination and pay-cable are not yet proven revenue sources, and improved reception, because of the general quality of local signals, will be a negligible factor. As to the Cooper Study, San Joaquin states as follows: the study's use of the Bakersfield market to predict what will happen in the Fresno market is without foundation; the in-market non-network "competitors" of KMPH-KFTV and KAIL—will carry Spanish language programming and will not be vying for the same audience; even accepting Pappas's figures, KMPH's market share loss would be 1.6 percentage points, and this loss is outweighed by the benefits of the orderly integration of cable television into the nationwide system of communications; the 11.7 percent cable penetration, even if true, ignores the dynamics of general growth factors in the market such as increases in population, number of TV homes, income per household and retail sales; Commission action at this time based on what may happen in the future should be withheld, since any remedial action could be taken when, indeed if, necessary.

4. In its reply, Pappas requested that its reply pleading filed in the special relief proceeding (CSR-962) be incorporated herein. Subsequently, it asked that San Joaquin's certificate application be consolidated with the special relief proceeding. The request is opposed by San Joaquin, which states that the motion to consolidate was late filed, and that, in any event, consolidation would delay certification of San Joaquin, thereby placing it at a competitive disadvantage with Fresno Cable. It states that San Joaquin's certification can be conditioned on the outcome of CSR-962.

5. We do not believe it appropriate to treat Pappas's special relief petition herein. By its own terms the

Cooper Study is not limited to the City of Fresno, but speaks to and requests relief in the entire area of dominant influence. The various cable systems within this area have responded in the special relief proceeding, and our withholding of certification to San Joaquin until the Commission completes its analysis of and makes determinations upon all the pleadings in that proceeding could place San Joaquin at a competitive disadvantage with previously-certified Fresno Cable. Our separate consideration of these matters will not prejudice Pappas, since San Joaquin will be subject to any relief afforded Pappas in CSR-962. Pappas's petition for consolidation is therefore denied.

6. In its Petition for Special Relief, Spanish International Communications Corporation (SICC) "requests that applicant be prohibited from carrying, on its proposed cable television system in Fresno, California, the signal of KEMO-TV, San Francisco, California." In support of its petition, SICC states the following: since commencing operations in 1972, KFTV has lost, in successive years, \$73,040, \$152,552, \$203,867; as the only Spanish language station in the San Joaquin Valley, its continued viability is of importance to the 222,700 Spanish-speaking residents of the San Joaquin Valley, and the local service it provides will be jeopardized by importation of KEMO-TV from San Francisco, since the City of Fresno accounts for 52 percent of the Spanish-speaking population in KFTV's service area; because its net weekly circulation in the market is only 9000 homes, and Arbitron Television does not attribute any share or rating points to it for any time period, the loss of any households to KEMO-TV would be significant. Finally, SICC states that denying carriage of KEMO-TV would be consistent with the Commission's action in *Big Valley Cablevision, Inc.*, FCC 73-414, 40 FCC 2d 662, *recons.*



granted, FCC 73-1244, 44 FCC 2d 1 (1973), *recons. denied*, FCC 74-947, 48 FCC 2d 648 (1974), *remanded*, *Big Valley Cablevision, Inc. v. FCC*, Civil No. 74-1961 (D.C. Cir., decided January 12, 1976), *Order*, FCC 76-86, — FCC 2d — (1976); and *Fresno Cable TV Company, Inc.*, FCC 75-360, 52 FCC 2d 249 (1975). SICC states that the Commission's goal of diversity will be adequately served by carriage of KFTV.

7. Trans-America Broadcasting Corporation also opposes carriage of the signal of KEMO-TV, which, states Trans-America, "will fragment and reduce to an unacceptable degree the Spanish-speaking audience for KAIL's locally-originated programs in that language." It states that KAIL is currently dark, but that, upon completion of its new transmitter site, will continue to carry "substantial *locally-originated* Spanish programming." In addition, it agrees with Pappas that importation of all distant independent signals should be prohibited. It states that the Fresno market has seven stations licensed to it, that it has [528] suffered income loss in each of the past five years, and that the variety of local service presently available abates the need for cable service.

8. In reply, San Joaquin states that carriage of KEMO-TV is consistent with the Rules; that SICC has not submitted comprehensive financial data which San Joaquin can review and comment upon; that the cases to which SICC refers are not in point; and that the Commission has stated that restrictions on carriage of foreign language stations will only be granted in unusual situations based upon a compelling demonstration by the affected station. San Joaquin concludes that the improved reception of KFTV resulting from cable carriage may well provide benefits outweighing any adverse impact from KEMO-TV, and notes that since KEMO-TV has

also experienced financial difficulties, the equities favor neither station. As to the objections of Trans-America, San Joaquin responds that no specific factual data in support of the requested waivers has been submitted, that no attempt to document the allegations of injury has been made, and that the Commission must reject Trans-America's claims as speculative and unsupported.

9. In *Report and Order in Docket 20553*, FCC 76-189, — FCC 2d — (1976), the Commission had occasion to reassess the matter of cable television carriage of specialty stations, i.e., those stations which appeal primarily to discrete segments of the population with particularized programming interests by carrying programming which, by virtue of its nature or content, is not of general interest to the average viewer. FCC 76-189 at paragraph 24. We expressly found Spanish language programming to be within this category and that, in general, carriage of such programming is in the public interest. But

[W]here the special format programming of the local and distant specialty stations is of basically the same type, however, the unique circumstances pertaining in the individual situation will determine whether the effect of competition on the local specialty station is likely to be critically adverse. Thus, while we shall not limit the carriage of distant specialty stations in markets where there is a local one, we shall entertain petitions for special relief on an *ad hoc* basis. FCC 76-189 at para. 36.

We are unable to conclude from the information before us that carriage of KEMO-TV by San Joaquin in the circumstances pertaining to this situation would be critically adverse to either KAIL or KFTV. Therefore, because our *Memorandum Opinion and Order in Docket 20553* was issued after the pleadings relating to carriage



of KEMO-TV were filed, we will hold in abeyance certification of that station for ninety days from the release date of this opinion to allow all parties to submit supplemental showings, tailored to the standard announced in paragraph 36, *supra*. It is impossible to announce in any comprehensive fashion the entire universe of factors that would support a finding of critically adverse impact, nor do we deem it wise to limit broadcast stations in making their showings by prescribing an inflexible, ironclad formula. The circumstances of each case are different. Here however, we need to know the extent to which KFTV and KAIL would be protected by our network program and syndicated program nonduplication rules. To make this determination, we need to have programming schedules of the stations in question, taken from a typical period of at least two weeks duration. Each program should be identified by language and as network (as denied by Section 76.5(o) of the Rules), syndicated, or other. Secondly, we need information as to both the general market structure and the particular nature of the objecting [529] party's own operations. We would find it helpful for the stations to supply, to the extent possible, the percentage and sources of revenues derived from each type of programming carried and the percentage of revenues derived from prime time programming. This information might include statements as to the trend of retail sales in the market, the ethnic composition of the market and the extent to which each station relies on advertisers in the City of Fresno. We would also like to know the size and type of each station's audience, prime time and 9:00 a.m. to midnight in terms of numbers of households. Data such as balance sheets and income statements, projected costs of programming, and other detailed financial information should be submitted for inspection by the Commission and San Joaquin. Such

evidence will have to be estimated by KAIL since it is presently off-the-air, but we believe it is now aware of the factors to which we will look. *See also* paragraph 26, *Second Report and Order in Docket 19995*, FCC 75-820, 54 FCC 2d 229, 243-44 (1975). It should give a complete accounting of the factors surrounding its decision to temporarily cease operations, and its firm intentions for the future. We emphasize that the burden of demonstrating that carriage of KEMO-TV by San Joaquin will adversely affect the objecting stations' local service falls on the objecting broadcast stations. In the event no supplemental pleadings are submitted, or those submitted fail to demonstrate adverse impact on local service, certification will be issued for carriage of KEMO-TV.

10. Fresno Cable Television Company initially objected to San Joaquin's application on the grounds that no franchise had been submitted, as is required by Section 76.13(a)(3) of the Commission's Rules, and that it could not therefore "be accepted for filing." San Joaquin thereafter amended its application with a franchise, "effective and in full force and effect at 12:01 o'clock a.m. on [April 3, 1976]," thereby mooted Fresno Cable's objections. None of the parties has objected to or otherwise commented upon the franchise as submitted, but San Joaquin observes its franchise is essentially identical to that granted Fresno Cable Television Company which the Commission has considered and approved. In so doing, notes San Joaquin, the Commission relied upon statements made in a letter to the Commission dated October 8, 1975, by the Chief Administrative Officer of the City of Fresno who, in clarifying several points of the franchise, stated that:

The City of Fresno will not hold a cable television franchisee contractually bound to provide services, equipment or operations which are inconsistent with

Commission requirements or standards. In areas preempted by the Commission, the City will not attempt to enforce its franchise (i.e., contract) provisions or otherwise bind the cable system to perform in these areas.

While the matter to which the Chief Administrative Officer was responding had specific reference to only a particular section of the franchise that, in effect, mooted any preemptive action by the state or federal government, we believe the broader interpretation San Joaquin suggests accurately reflects the City's sentiments. We therefore shall not revisit those franchise provisions discussed in *Fresno Cable Television Co., supra*. We note, however, that San Joaquin's application to the City, incorporated by reference into the franchise at Section 2(b)(3) of Ordinance No. 76-21, contains extensive technical standards for both equipment and system operation. While the terms of the proposal [530] do not appear to have been made legally binding commitments, they are not, in any event, enforceable by the City to the extent they are different from the Commission's technical standards. See *Report and Order in Docket 20018*, FCC 74-1168, 49 FCC 2d 470 (1974). We also note that Ordinance No. 76-21 5(b) provides for a "franchise fee for out-of-city operations served by the facilities located over or under City streets, payable quarterly to the City . . . [of] three percent of the basic subscriber receipts from out-of-city operations," a charge apparently not assessed against Fresno Cable. Since any such operations would constitute a separate cable television system pursuant to Section 76.5(a) of the Rules, requiring a separate certificate of compliance, the fee would be reviewed for consistency with Section 76.31(b) when the certificate is sought.

In view of the foregoing, the Commission finds that grant of the above-captioned application for certificate of compliance is in the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certificate of Compliance" filed by San Joaquin Cable TV, Inc. (CAC-5821), IS GRANTED, to the extent indicated herein, and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certificate of Compliance and Petition for Special Relief," filed by Pappas Television, Inc., IS DEFERRED for consideration in special relief proceeding CSR-962, pursuant to paragraph 5, *supra*, and otherwise IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Special Relief," filed by Spanish International Communications Corporation, licensee of Station KFTV, Hanford, California, IS HELD IN ABEYANCE for ninety (90) days from the release date of this opinion, pursuant to paragraph 9, *supra*, and otherwise IS DENIED.

IT IS FURTHER ORDERED, That the "Trans-America Broadcasting Corp. (KAIL) Opposition to Application for Certificate of Compliance" filed by Trans-America Broadcasting Corporation, licensee of Television Broadcast Station KAIL, Fresno, California, IS HELD IN ABEYANCE for ninety (90) days from the release date of this opinion, pursuant to paragraph 9, *supra*, and otherwise IS DENIED.

IT IS FURTHER ORDERED, That the "Motion to Reject or, in the Alternative, Opposition to Request for Special Relief," filed by Fresno Cable Television Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,  
VINCENT J. MULLINS, *Secretary*.



[61 F.C.C.2d 1051-1058]

F.C.C. 76-953

[1051]

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In Re: ]  
 PAPPAS TELEVISION, INC. ] CSR-962  
 Petition for Special Relief ]

## MEMORANDUM OPINION AND ORDER

(Adopted: October 13, 1976;

Released: November 2, 1976)

BY THE COMMISSION: COMMISSIONER WHITE NOT  
 PARTICIPATING.

1. On November 26, 1975, Pappas Television, Inc., licensee of Television Broadcast Station KMPH (Ind., Channel 26), Tulare, California, filed the instant petition entitled, "Supplement To Opposition To Application For Certificate of Compliance" ("Cooper Study"). Pappas intended that pleading to supplement its opposition to the Certificate of Compliance applications of Fresno Cable Television Company, Inc., (CAC-01231 and CAC-01896). However, the Commission at footnote 7 of *Fresno Cable Television Company, Inc.* (Fresno, California), FCC 75-1373, 57 FCC 2d 134 (1975) declared:

On November 26, 1975, Pappas submitted the "Cooper Study," which purports to analyze the impact of two imported independent stations on KMPH's revenues. Because the study was filed more than two and one half years after the pleading cycle on the impact issue had been completed it will not be considered in this proceeding. However,

since it addresses the entire Fresno area of dominant influence, it will be treated separately as a petition for special relief.

Pappas resubmitted the "Cooper Study" as an opposition to the certificate of compliance application of San Joaquin Cable TV, Inc., (CAC-05821). At paragraph 5 of *San Joaquin Cable TV, Inc.* (Fresno, California), FCC 76-444, 59 FCC 2d 525 (1976), the Commission reiterated its position and stated:

We do not believe it appropriate to treat Pappas's special relief petition herein. By its own terms the Cooper Study is not limited to the City of Fresno, but speaks to and requests relief in the entire area of dominant influence. The various cable systems within this area have responded in the special relief proceeding, and our withholding of certification to San Joaquin until the Commission completes its analysis of and makes determinations upon all the pleadings in that proceeding could place San Joaquin at a competitive disadvantage with previously-certified Fresno Cable. Our separate consideration of these matters will not prejudice Pappas, since San Joaquin will be subject to any relief afforded Pappas in CSR-962.

[1052] 2. Pappas's petition has generated the oppositions of Fresno Cable TV Co., Televents of San Joaquin Valley, Inc., Warner Cable of Kings County, San Joaquin Cable TV, Inc. and a statement in support of the oppositions filed by Bakersfield Cable TV, Inc. Pappas has responded to the oppositions and Fresno Cable TV has replied to Pappas.<sup>1</sup>

<sup>1</sup> We note that Fresno Cable's reply is not contemplated by our Rules, but we have accepted it in an effort to compile a full and complete record.



3. With the exception of some brief introductory remarks, Pappas's entire petition consists of the "Cooper Study." As Pappas states in the introduction, the "Cooper Study" was prepared by Roger N. Cooper, a media research counsel, to assess, "the estimated negative impact of cable television throughout KMPH's service area as a result of the proposed carriage of two distant independent signals."

#### History

4. Because of the unique nature of this proceeding it would be helpful to briefly outline the history which led to Pappas's submission of the "Cooper Study." KMPH began broadcast operations in October 1971. Since that time Pappas has consistently opposed every application for a certificate of compliance filed by a cable television system located within the Fresno, California major television market (#72) and the Tulare, California smaller television market.<sup>2</sup> Substantively, these oppositions have been two-pronged. First, Pappas has asserted that it is entitled to mandatory carriage on all those systems which did not propose its carriage, whether the provisions of Sections 76.59 and 76.63 of the Rules require it or not.<sup>3</sup> Pappas has advanced the following arguments in

<sup>2</sup> Pappas's oppositions to the importation of distant signals have been denied in the following cases: *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116, *recons. granted in part*, FCC 74-1396, 50 FCC 2d 340 (1974), *stay denied*, FCC 75-360, 52 FCC 2d 249 (1975); *Hanford Cable Co.*, FCC 74-844, 48 FCC 2d 132 (1974), *recons. granted in part*, FCC 74-1395, 50 FCC 2d 351 (1974); *Fresno Cable Television Company, Inc.*, *supra*; and *San Joaquin TV, Inc.*, *supra*. Additionally, these cases have all been consolidated on appeal in the United States Report of Appeal for the District of Columbia, Case Nos. 75-1115, 75-116, 75-1408 and 76-1010.

<sup>3</sup> Sections 76.59 and 76.63 set forth the signal carriage requirements for smaller and major television markets (second 50) respectively.

support of this assertion: (a) KMPH is a "local" station even though many of the systems involved are not located within the specified zone of the Tulare market; (b) KMPH is significantly viewed throughout the Fresno market even though it has not been accorded that status by the viewing surveys conducted for the Commission and cannot itself bear the expense of establishing that status pursuant to Section 76.54(b) & (c); (c) KMPH is, pursuant to broadcast rules, affirmatively required to serve the communities where these cable systems are located and non-carriage by cable systems in these communities would hinder KMPH in fulfilling this duty; (d) because of its precarious financial position, KMPH needs the markets served by the cable systems for audience and revenue if it is to remain viable; and (e) KMPH has invested over a million dollars in equipment service to the San Joaquin Valley and mandatory carriage throughout its coverage area is necessary to implement Commission's policy of promoting the development of local television service. The second prong of Pappas's oppositions has been a request that the Commission prohibit the carriage of other distant independent signals on cable sys-[1053]tems located within these two markets. To support this argument, Pappas has alleged: (a) since it is located within a smaller market it is not entitled to syndicated exclusivity protection; (b) even if it were to receive syndicated protection it would be meaningless because it would not be able to compete with major stations in the acquisition of programming; (c) only approximately 50% of KMPH's advertising revenue is derived from Tulare County and national advertising and the remaining portion must come from sources throughout the remaining environs of KMPH's service area (i.e. the San Joaquin Valley); (d) the Commission has an obligation pursuant to Section 307(b) of the Communications Act

to protect the development of locally-owned stations and not to subvert that development by allowing the importation of distant signals operated by licensees having no obligation to serve the needs and interests of the viewers in the San Joaquin Valley; and (c) cable carriage of "local" signals will provide adequate television service to residents of the San Joaquin Valley.

*The "Cooper Study"*

5. Pappas has continued to advance these arguments in its untiring opposition to every pertinent application for a certificate of compliance. And although the Commission has now granted Pappas "significantly viewed" and therefore "must carry" status throughout Fresno and Tulare Counties, we have consistently rejected Pappas's request that no additional distant independents be carried on the subject cable systems. At paragraphs 5 and 6 of *Fresno Cable Television Company, Inc. supra*, we stated in part:

Turning to the signal carriage issues, we note that we have previously considered the competing interests in detail. In *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116, *recons. granted in part*, FCC 74-1396, 50 FCC 2d 340 (1974), *stay denied*, FCC 75-360, 52 FCC 2d 249 (1975) and in *Hanford Cable Co.*, FCC 74-844, 48 FCC 2d 132 (1974), *recons. granted in part*, FCC 74-1395, 50 FCC 2d 351 (1974), we found that KMPH was in need of some relief. Accordingly, we waived portions of Section 76.54 of the Rules to enable the station to establish its status as significantly viewed in Fresno County more easily. We stated that Pappas should submit the certified results of all independent professional audience surveys used to demonstrate viewing strength, and that "[i]f, upon review of those results, we find KMPH is 'significantly viewed'

in a county [i.e., that the station has a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent in that county], we will afford the station mandatory signal carriage rights on all cable systems operating or proposing to operate in that county." Pappas has submitted surveys which satisfy our criteria and establish that KMPH is significantly viewed in several counties, including Fresno. The station is, therefore, a "must carry" pursuant to Section 76.61(a)(5) of the Rules, and we will *sua sponte* waive the procedural requirements of Sections 76.18 and 76.25 and require Fresno Cable to add KMPH to its proposed signal carriage complement without requiring further public notice. Compare *New Worlds Cable TV, Inc.*, FCC 75-332, 52 FCC 2d 301 (1975). We will not, however, preclude Fresno Cable from carrying "distant" independent signals consistent with our Rules. As stated in *Fresno Cable TV Co., Inc.*, and *Hanford Cable Co.*, *supra*, parties seeking to impose restrictions upon carriage of otherwise permissible signals are faced with a substantial burden; absent a "substantial showing," we will not deviate from the "go, no-go" concept of the carriage rules. Clarifying these points, we held that any showings must contain specificity of fact and demonstrate that the proposed cable television service will adversely affect the station's revenues to an extent that impairs its ability to serve the public interest. Without such precise impact statistics, we are reluctant to handicap a new cable television system by denying it "the minimum amount of new service needed to attract large amounts of investment capital for the construction of new systems . . . to open the way for the full development of cable's potential." Paragraph 90, [1054] *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 178 (1972).



Each station shows a steadily improving financial posture, and since neither Pappas nor Capital Cities has timely submitted the requisite detailed impact analysis, their requests will be denied.

6. The "Cooper Study" was submitted by Pappas in an attempt to demonstrate the predicted adverse impact on KMPH of distant signal carriage by cable systems throughout the Fresno ADI. The staff's evaluation of that study and Pappas' reply to the oppositions ("Cooper Study II") is contained in Appendix A<sup>9</sup> attached hereto. While the "Cooper Study" is an extensive document designed to provide an in-depth analysis of the effect of distant signal carriage in the Fresno and Tulare markets on KMPH, it can be reduced to three interrelated predictions: (a) Cable television penetration in the Fresno, California Area of Dominant Influence (ADI) will grow from the present level of 6% to between 45% and 55% in 1985; (b) Averaged over the entire Fresno ADI, it is estimated that KMPH's share of the cable audience would be 43% less than its share of the non-cable audience in 1985 if the Commission allows the importation of two distant independents. It is predicted that KMPH's non-cable share of audience would increase from the present level of 9% to 13% in 1985; and (c) the importation of two distant independent signals would cause KMPH's revenue to be 11.7% lower at 50% cable television penetration than if cable television systems were not allowed to carry any distant independent signals.

7. The five oppositions to Pappas's petition generally stress the same matters: (a) Many of the "Cooper Study's" figures and conclusions are not relevant to the situation in question; (b) the basic assumptions under-

<sup>9</sup> Appendix deleted. May be secured from Commission in Wash., D.C.

lying the gathering of data are often unsupported or otherwise highly questionable; (c) the "Cooper Study" presents only generalizations and unsupported assertions rather than a factual showing concerning KMPH's present financial condition and its recent financial history; (d) the "Cooper Study" completely fails to link the predicted audience and revenue losses directly to the importation of two distant independent signals; (e) the "Cooper Study's" use of Bakersfield, California as an analogous market is misplaced since significant differences exist between the two markets, particularly the fact that the Bakersfield market imports four distant Los Angeles independents and three Los Angeles network affiliates. Additionally, the opposition of Fresno Cable TV Co., Inc., contains a "Review and Comments on 'The Cooper Study'" prepared by Edward Shafer, an economic consultant in the communication industry. In contrast, Mr. Shafer's analysis produced the following projections:

(a) Assuming proper management, Station KMPH (TV) will become a viable UHF independent station notwithstanding cable television operations within the Fresno ADI. The Cooper Study fails to provide any projections of KMPH's audience, revenues, expenses and profits for 1985. Without such data, it is not possible to predict the financial position of KMPH(TV) in 1985.

(b) Station KMPH(TV) is likely to increase its audience share to at least 13% in 1985. Even with cable television penetration of 50% in the ADI, KMPH's overall audience share will increase some 19% from its present 9% level to 10.7% (higher than [1055] Cooper's estimate of 10.2%). Of the local stations, KMPH's share of audience would be 12.6% in 1985 as compared to 13.7% without cable television at 50% penetration.



(c) The projected 17% increase in the number of households in the Fresno ADI will produce a corresponding increase in the station audiences. The "average" audience of KMPH(TV) will grow to 11,872, a 39% increase over 1975.

(d) The Cooper Study's forecast of an 11.7% revenue loss for KMPH(TV) as a result of 50% penetration by cable television is grossly misleading. In fact, it is reasonable to conclude that KMPH will enjoy significantly greater revenues in 1985 than during its last fiscal year.

(e) There is nowhere in the Cooper Study an explicit, unqualified statement that the growth of cable television in the Fresno ADI will have such an impact on Station KMPH(TV) as to preclude it from introducing local news programming and expand its current public affairs—public service programming. Moreover, Mr. Cooper's reliance on the Bakersfield market experience to support even his guarded intimation of the effect of CATV growth in KMPH's future programming is wholly misplaced. Assuming, *arguendo*, the validity of the data relied upon by Mr. Cooper with respect to station programming in the Bakersfield market, there are numerous reasons why the Bakersfield experience does not offer a valid basis for comparison with Fresno. However, it should be emphasized that even with CATV penetration of some 50% in the Bakersfield market, the local stations experienced striking gains in national and local revenues from 1967 to 1974.

8. The response of Pappas to the opposition is generally a restatement of the history of the proceeding and an indictment of the study conducted by Mr. Shafer. Pappas emphasized the alleged uniqueness of the Fresno market and declares:

The Fresno television market is like no other in the second fifty or, for that matter, like the majority of the top fifty markets in the United States. No such "second fifty" market has as much television service available off-the-air. Indeed, with three network affiliates and an independent station licensed to Fresno, a Spanish language station in Hanford, and KMPH in Tulare, all placing City Grade signals over Fresno, this area has more commercial television service than most of the top fifty television markets, including Washington, D.C., the nation's eighth television market.

To support its attacks on Mr. Shafer's study, Pappas submitted additional "Comments of Roger Cooper" ("Cooper Study II"). These comments are also analyzed by the staff in Appendix A.<sup>9</sup> However, it is important to note the basic predictions arrived at in "Cooper Study II." Mr. Cooper estimates that expenses will increase from the present \$1,503,217 to \$2,251,642 by 1985. At that rate he predicts that KMPH would have a profit of \$379,758 with no importation of distant signals; however, with the importation of two distant signals and 50% cable penetration, that profit would be reduced to \$130,358. Mr. Cooper further estimates that if KMPH elected to provide local news programming, the additional expense would be \$346,248 by 1985. Therefore, Mr. Cooper declares, if KMPH elects to provide local news [1056] which it does not presently program, it cannot earn a profit by 1985 unless importation of distant signals is prohibited. Finally, in response to the Shafer Study, Mr. Cooper revised downward the predicted revenue impact on KMPH at 50% cable penetra-

<sup>9</sup> Appendix deleted. May be secured from Commission in Wash., D.C.

tion from 11.7% to 7.9%. This was due to the fact that the initial prediction was based on a direct relationship between "share and market revenue." However, Cooper's review of his first prediction showed that KMPH's share of revenue has been higher than its share of audience.\*

#### Discussion

9. We have consistently held that parties seeking to impose restrictions upon carriage of otherwise permissible signals are faced with a substantial burden and absent a compelling showing we will not deviate from the "go, no-go" concept of the carriage rules.<sup>4</sup> The compelling showing necessary to meet this burden must demonstrate that the proposed cable television service will adversely affect the station's revenues to an extent that impairs its ability to serve the public interest. It was in response to this requirement that Pappas submitted the "Cooper Study." However, simply submitting a showing that purports to demonstrate the requisite adverse affects does not satisfy the burden of proof. The Commission staff has undertaken an extensive analysis of the "Cooper Study" and for the reasons outlined below (and in the attached Appendix<sup>9</sup>) we conclude that Pappas has failed

\* Additionally, on September 17, 1976, Pappas filed a "Request for Oral Argument and an Open Proceeding." Pappas stated that oral argument was necessary to expose the Commission to the positions of all parties. Aside from the fact that this request was filed almost six months after the pleading cycle in this matter was completed we believe that the nearly 1,000 pages of pleadings have fully exposed the Commission to the positions of all parties and we can perceive no useful purpose which would be served by holding an oral argument. We will therefore, deny Pappas's request.

<sup>4</sup> See, e.g., *Fresno Cable TV Co., Inc. and Hanford Cable Co., supra*.

<sup>9</sup> Appendix deleted. May be secured from Commission in Wash., D.C.

to demonstrate with specificity of fact that the importation of distant independent signals into the Fresno ADI will adversely affect KMPH's revenues to the extent that its ability to serve the public interest would be impaired.

10. The Cooper Study is a straightforward but statistically unpersuasive attempt to project to 1985 a negative financial impact on KMPH from the carriage of distant independent signals on neighboring cable systems. By its nature, the study is speculative. It estimates 1985 expenses for the station at \$2.25 million. Against this it projects revenues ranging from \$2.63 million to \$2.42 million—the higher figure if KMPH is protected against all distant independents, the lower figure if our rules prevail. There is no dispute that the station is becoming profitable and that its audience is growing steadily. By Mr. Cooper's own figures, our failure to grant the instant petition will still allow a projected profit of nearly \$200,000 in 1985. Thus, the study's finding of a nearly 8% negative financial impact from distant signal competition to KMPH does not represent a "loss" but a reduced profit. As shown below, however, even that 8% figure is open to serious question.

11. Initially, we question the value of the "trend line" model used for [1057] revenue projection by the Cooper Study.<sup>5</sup> This type of forecast allows for an extremely large statistical error, undermining our confidence in the predictions. Moreover, the study assumes—

<sup>5</sup> A linear trend model is a mathematical equation in the form of a straight line which defines a relationship between a dependent variable (revenue in this case) and a time period (a year in this case) based on known data. This equation is then used to predict a value of the dependent variable for a new time period. In Mr. Cooper's study revenue for the Fresno market from 1967 to 1974, is used to derive the equation and then it is applied to 1985 for a predicted market revenue.



without support of any kind—that the ratio of KMPH's revenue to its audience will decrease as *audience share* increases. If the ratio were to remain constant or increase, as well it might, KMPH's revenues in 1985 would exceed the Cooper predictions substantially.

12. Nevertheless, assuming *arguendo* that the study's total revenue projection of \$2.63 million for 1985 may be relied upon, we still find two basic weaknesses in Mr. Cooper's calculations tending to inflate the 7.9% negative impact said to result from distant signal importation against KMPH. First, the Bakersfield ADI is used as a model to estimate future cable penetration in the Fresno ADI—although the current figure for Bakersfield is 52% compared with only 6% presently for the Fresno ADI. Considering the Bakersfield ADI together with the 50% penetration in the city of Porterville, and also making use of the Rand cable penetration model, the Cooper Study projects a 50% penetration for the Fresno ADI by 1985. It is important to note, however, that both the Porterville and Rand figures are for discrete communities, not diffuse ADI's. An ADI typically contains rural densities of population which cannot support cable systems under present and foreseeable technology. For example, the Bakersfield ADI is 18% rural, 82% urban, but the Fresno ADI, even by 1985, will remain more rural (31% rural, 69% urban) by Mr. Cooper's own estimate. Accordingly, Bakersfield is not the best of predictive models. Assuming a correlation between extent of urbanization and cable penetration, a rough adjustment of the Bakersfield model to conform it to Fresno would reduce predicted negative impact by the urbanization differential: 7.9% times 69/82 equals 6.6%.

13. A second basic weakness in Mr. Cooper's calculations proceeds from his assumption that two distant independent signals, on the average, could be imported

into the entire Fresno ADI. However, that average is swelled by a finding that one distant independent would be permitted, and carried, in certain portions of the Hanford and Tulare smaller markets which are not overlapped by the Fresno specified zone. In fact, these portions—which account for nearly 20% of the Fresno ADI, are permitted no distant independents whatever under present rules.<sup>6</sup> A further rough adjustment to Mr. Cooper's predicted negative revenue impact to account for this factual error would bring that figure down to 6%.<sup>7</sup>

14. When these adjustments are considered in light of our concern over the study's simplistic methods of revenue projection (paragraph [1058] 11), and when it is remembered that Mr. Cooper forecasts growing revenues, audiences and profits for KMPH with or without competition from distant independents, we are unable to conclude that the relief sought is needed to prevent loss of service to the public.<sup>8</sup>

<sup>6</sup> Section 76.59 provides for the carriage of one independent station in a smaller television market be it local or distant. Since KMPH is an independent "must-carry" signal in the Tulare market no other independents may be imported unless they are also "must-carries," but certainly no distant independents.

<sup>7</sup> Since one distant signal was used in this area, as compared to the average of 2 signals for the entire ADI, the estimate should be reduced by 1/2 of 19% or 9-1/2%. ( $6.7\% \times 90-1/2\% = 6.1\%$ ).

<sup>8</sup> Petitioner asserts that a large enough profit—such as it predicts would be realized if distant independents were banned from the KMPH service area—would allow it to begin providing local news service. Given the forecast of profitability, in any event, by 1985 it is simply going too far for the Commission to concern itself with the reinvestment policies of the station.



In view of the foregoing, the Commission finds that a grant of the subject petition would not be in the public interest.

Accordingly, IT IS ORDERED, That the petition for special relief (CSR-962) filed by Pappas Television, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,  
Vincent J. Mullins, *Secretary*.

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-1115

September Term, 1977

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission and  
United States of America, Respondents

Hanford Cable Co., Inc., Intervenor

75-1116

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission and  
United States of America, Respondents

Fresno Cable TV Company, Intervenor

75-1408

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission  
and United States of America, Respondents

Televents of San Joaquin Valley, Inc., Intervenor

76-1010

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission  
and United States of America, Respondents

Fresno Cable TV Co., Inc., Intervenor

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1494                      -2-                      September Term, 1977

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission  
and United States of America, Respondents

San Joaquin Cable TV, Intervenor

76-2042

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission  
and United States of America, Respondents

Fresno Cable TV Co., Inc.

San Joaquin Cable TV, Intervenor

PETITIONS FOR REVIEW OF ORDERS OF THE FED-  
ERAL COMMUNICATIONS COMMISSION

Before: McGOWAN, LEVENTHAL AND ROBB, Circuit  
Judges

JUDGMENT

These causes came on to be heard on petitions for review of orders of the Federal Communications Commission and were argued by counsel. On consideration of

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Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

the foregoing, and in accordance with the attached memorandum, it is

ORDERED AND ADJUDGED by this Court that the orders of the Federal Communications Commission on review herein are hereby affirmed as to Nos. 75-1116, 75-1408, 76-1010, 76-1494 and 76-2042.

It is FURTHER ORDERED by the Court, that the petition in No. 75-1115 is hereby dismissed.

Per Curiam  
For the Court  
/s/ George A. Fisher  
George A. Fisher  
Clerk

MEMORANDUM

These petitions for review come to us against the backdrop of a rulemaking proceeding directed towards the establishment of the levels of cable television service to which each of the national markets would be entitled. *Cable Television Report and Order*, 36 F.C.C. 2d 143 (1972). Relief against the standards therein prescribed is available to local UHF and VHF stations only by invoking a special relief procedure provided by the Commission. 47 C.F.R. 76.7. As is ordinarily true of efforts to obtain a waiver of the policies established in rulemaking, the petitioner bears a heavy burden to demonstrate both the need for waiver and its compatibility with the public interest.

The appeals before us fall into two groups. Nos. 75-1115, 1116, and 1408 were petitioner's first effort, asserting adverse economic impact upon itself, to obtain such special relief in connection with three applications for certificates of compliance for cable television systems.

In No. 75-1115, the application of Hanford Cable Co. was denied, and respondent FCC argues—persuasively, we believe—that petitioner has no interest justifying judicial review of that order, since the certificate grant opposed by it was refused. Petitioner purports to be concerned about language in the FCC's opinion as being detrimental to petitioner's claims generally, but we do not think there is a controversy before us warranting our consideration; and we direct that the petition in No. 75-1115 be dismissed.

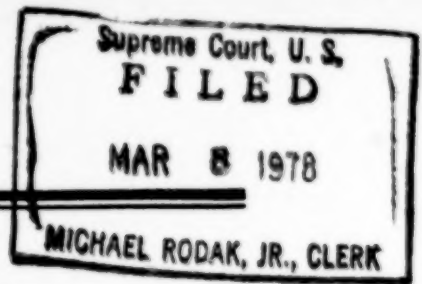
In Nos. 1116 and 1408, the cable service applicants, Fresno Cable T.V. Company and Televents of San Joaquin Valley, Inc., were successful; and the merits of petitioner's objections are properly before us. In neither instance do we conclude that the showing made by petitioner sustains the substantial burden it must carry to warrant our directing that it be given special relief from the provisions of the Commission's rules, which are fully applicable because the certificates granted are outside petitioner's own market (Tulare). To the extent that petitioner complains that the Commission has no standards to apply, the cases cited by the parties reveal that the Commission will accept a specific showing, albeit one difficult to establish, that the challenged aspects of the cable programming will substantially damage local stations *and* that such aspects could be deleted without preventing cable from successfully entering the market. To the extent that petitioner complains of discriminatory treatment in relation to the grant of special relief to another objectant, KAIL, the record contains ample evidence of the differences in their respective circumstances to render rational the Commission's differentiation between the two.

The second group of appeals (Nos. 76-1010, 76-1494, and 76-2042) grow out of later oppositions by peti-

tioners to extensions of cable services. In the first two, the Commission respectively granted certificates of compliance to Fresno Cable T.V. Company covering operations in Fresno and Fresno County, and to San Joaquin Cable T.V. in Fresno. Petitioner, three years after its original objections and at a time when these proceedings were far advanced, filed an economic impact analysis, known as the Cooper Study. With the consent of petitioner, the Commission set up a special relief proceeding (No. 76-2042) covering an area as wide as that of the Cooper Study (which went beyond the area served by Fresno and San Joaquin), in which five cable systems participated. The Commission weighed the Cooper Study with care, making such adjustments as it believed to be warranted, and concluded that it did not make out a case of economic injury to petitioner sufficient to justify waiver of the standards set in its rules. Our examination of the record reveals substantial evidence to support this conclusion, and the reach of our substantive reviewing function is thus exhausted. Petitioner's claim of procedural impropriety in the Commission's handling of a staff rebuttal of the Cooper Study fails because the essential condition of its being before us was not met, 47 U.S.C. § 405; and, in any event, we do not regard the Staff Evaluation as a filing by a party to which petitioner was entitled to respond prior to decision.

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In The  
**Supreme Court of the United States**  
October Term, 1977

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**No. 77-1101**

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PAPPAS TELEVISION, INC.,  
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
and  
UNITED STATES OF AMERICA,  
*Respondents.*

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**JOINT BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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In The  
**Supreme Court of the United States**  
October Term, 1977

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No. 77-1101

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PAPPAS TELEVISION, INC.,  
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
and  
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---

**JOINT BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

San Joaquin Cable TV and Fresno Cable TV Co., Inc.,  
hereby jointly oppose pursuant to Rule 24 of this Court the  
Petition for a Writ of Certiorari to the United States Court  
of Appeals for the District of Columbia Circuit filed by  
Pappas Television, Inc.

**COUNTERSTATEMENT OF THE CASE**

Petitioner's Statement of the Case is incomplete, inaccurate and misleading. Hence the need for this Counterstatement. The petition filed by Pappas Television, Inc. (Pappas), seeks review of a *per curiam* judgement of the

United States Court of Appeals for the District of Columbia Circuit affirming a series of decisions of the Federal Communications Commission (Commission) rejecting Pappas' requests that carriage of two distant independent stations ordinarily permitted by the Commission's Rules be prohibited on cable television systems in the Fresno, California, area.

San Joaquin Cable TV (San Joaquin) and Fresno Cable TV Co., Inc. (Fresno Cable), were granted pursuant to two of the Commission's orders under review certificates of compliance to operate a cable television system in the City of Fresno. Fresno Cable pursuant to another of the orders under review was granted a certificate of compliance to operate a system in other communities in the Fresno area. (App. 8). They were also parties to the proceeding set forth beginning on App. 70. San Joaquin and Fresno Cable were intervenors in the proceeding before the Court below.

The most critical fact omitted by Pappas is the disastrous effect on cable television in the Fresno area that would result from the grant of the relief sought by Pappas — a prohibition on the carriage of the two distant independent signals permitted by the Rules.<sup>1</sup> The two distant independents are the only English language commercial stations proposed by San Joaquin and Fresno Cable that are not available off-the-air in the Fresno area. (App. 35 and 59-60). The Commission's Rules permitting their carriage are bottomed on the proposition that people will not be willing to pay the extra money to receive cable television service if they receive only the signals already available free off-the-air. There is evidence in the record

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<sup>1</sup>The term distant signal refers to any television station that cannot assert a mandatory right to cable carriage on a given system under the applicable Rule governing signal carriage. The pertinent Rule governing signal carriage in Fresno is 47 C.F.R. § 76.63 which cross-references to 47 C.F.R. § 76.61.

that without the two distant independent signals, construction of the cable television system in Fresno is not economically viable. Thus, the grant of the drastic relief sought by Pappas would deprive the public in Fresno of the benefits of cable television.

The Commission's Rules permit the carriage of distant educational, foreign language and religious stations as well as programming originated by the cable operator; however, generally these types of programming are of interest only to small segments of the population and would not in and of themselves make cable television feasible. The only non-broadcast service of possible general interest is subscription or pay cable. This is a service whereby subscribers may for an additional charge over and above the fee for basic cable service receive such programming as first-run feature films and other programming not available from conventional television. This service, however, is developmental in nature and gives rise to additional costs and problems so that it would be impossible to rely solely on this service to assure the feasibility of a cable system. At this time, the carriage of distant television signals providing programming of general interest remains essential for the viability of a cable system in an area such as Fresno. There may be some areas where over-the-air reception is so poor that a cable system could survive without distant signals because of the improved reception of local signals; however, this is not the case in Fresno where there are seven local stations which provide high quality signals.

The record before the Commission amply supports the fact that cable television would not be viable in Fresno without the carriage of distant signals. The fact is also evident since Fresno Cable first obtained a franchise to operate a cable television system in the City of Fresno in 1966. The system was, however, unable to commence operations until 1977 first because it was impossible to obtain authorization for the carriage of distant signals under

the Commission Rules in effect prior to 1972 and second because of Pappas' lengthy efforts to obtain a waiver of the post-1972 Rules allowing distant signal carriage.

The record in this case also establishes that cable television provides positive benefits to the public. The increased program diversity available to the public is only one benefit. Perhaps most significant is that cable television provides to the general public access to the media of mass communications. Pursuant to 47 C.F.R. § 76.254, all cable television systems serving 3,500 or more subscribers (which will include the system in Fresno) must have channel space available for use by members of the public, educational authorities, local governments, and persons desiring to lease space. Such parties may use the channel space to present programs of whatever type they desire, subject only to limited restrictions imposed by the Commission's Rules. Pursuant to 47 C.F.R. § 76.256, such cable systems must have available equipment for use in the production and presentation of public access programs. Access services of this nature are not available on the typical over-the-air television station. Moreover, it is San Joaquin's intention to provide access services substantially in excess of those required by the Commission's Rules. In addition, cable television has the potential for many other public services including two-way communications, digital services such as burglar alarms and locally originated cablecasting services of virtually all description.

Pappas, the party seeking to restrict signal carriage ordinarily permitted by the Rules, is the licensee of television station KMPH. Pappas alleges at page 4 of its petition that its station — KMPH — is a Fresno station. It should be clarified that KMPH is licensed to Tulare, California, only. Tulare is a community located approximately 40 miles from the City of Fresno. For the purposes of the Commission's cable television rules, Tulare is not considered part of the Fresno market. 47 C.F.R. § 76.51(a). A television market is

defined by the Commission's Rules as including an area extending 35 miles from a fixed reference point in a television station's city of license. 47 C.F.R. § 76.5(f), (g) and (i). Accordingly, since the City of Fresno is located more than 35 miles from Tulare, KMPH's city of license, the City of Fresno is not located in KMPH's television market as defined by the Commission's Rules.<sup>2</sup>

Pappas further states at page 4 of its petition that KMPH places a city grade contour over the entire City of Fresno. It should be noted that the record contains evidence that despite this *predicted* contour, many persons in Fresno do not receive a satisfactory signal from KMPH. This is significant since carriage of KMPH on cable television will serve to correct these reception problems.

The present cable television rules which Pappas seeks the Commission to waive were adopted in the *Cable Television Report and Order*, 36 FCC 2d 143 (1972). The Commission's action was preceded by an extensive four-year rulemaking proceeding in which various proposals were set forth and exhaustive comments were received. Pappas alleges at pages 6 to 7 and footnote 11 that the Commission lacked standards in adopting its Rules and that the Commission has "never disputed" this. The only evidence in the record to support the alleged lack of standards is a conclusory one sentence allegation by Pappas' economic consultant to this effect. This conclusory allegation was completely worthless in nature in that it set forth no factual basis for the conclusion. Nor is there any basis in the record for Pappas' assertion that the Commission "never disputed" its allegation. In point of fact, the underlying validity of the cable television rules was never raised in any

<sup>2</sup>When Pappas first acquired KMPH, it represented to the Commission that it was not the station's intention to serve Fresno. *Pappas Television, Inc.* 38 FCC 2d 154, 155 (1972).



meaningful way in the proceeding before the Commission and is not properly within the scope of this appeal.

Pappas' ultimate showing in its lengthy effort to convince the Commission to abandon its signal carriage rules is the Cooper Study.<sup>3</sup> The Cooper Study is an attempt to predict the impact on KMPH of future cable carriage of two distant independents on future cable systems throughout the Fresno Area of Dominant Influence (which encompasses an area of five counties). It consists principally of economic projections covering a period extending to 1985. Since it is attempting to predict future impact rather than to assess the impact of existing cable service (which is as yet minimal in the Fresno area), it necessarily relies on numerous assumptions. The validity of these assumptions was the subject of extensive and heated debate in the proceeding before the Commission.

Pappas' characterization of the Commission decision concerning the Cooper Study (App. 70) at page 8 of its petition is disingenuous. The characterization of the Commission's decision by the Court below is more accurate:

"The Commission weighed the Cooper Study with care, making such adjustments as it believed to be warranted, and concluded that it did not make out a case of economic injury to petitioner suf-

<sup>3</sup>Pappas notes at page 8 and footnote 13 the material received from one Clay which was allegedly ignored by the Commission. Clay is described as a "media economist". In fact, the record reflects Clay is qualified in broadcast survey research. His contribution consisted of a small amount of background information on the Fresno market and opinions concerning the correct methods of making financial projections. In addition, he executed a 2 page statement endorsing the Cooper Study. This statement was conclusory in nature and contributed no additional facts. The significance of Clay's material was accordingly *de minimus* in nature.

ficient to justify waiver of the standards set in its rules." (App. 89).

It should be noted that the Commission's decision included as an attachment an analysis of the Cooper Study by an economist with its Cable Television Bureau. (App. 76 and 79). In violation of Rule 23(1)(i) of this Court, Pappas has failed to include a copy of this staff analysis in its Appendix. The staff analysis demonstrates that the Commission made an exhaustive analysis of the merits of the Cooper Study.

Pappas alleges at footnote 14 on page 8 that it had sought alternative relief in the form of syndicated program protection. This is in error. At no time in the proceeding before the Commission did Pappas request syndicated program protection.<sup>4</sup> Indeed, such a request would have been inconsistent with Pappas' contention that only the complete prohibition of the two distant independents would save it from ruin.

The Court below affirmed the Commission without a formal opinion. It should be noted that the Memorandum set forth at App. 87 to 89 is an informal discussion of the Court's view of the case. The original of the order bore the notation "Not to be published — see local rule 8(f)." Rule 8(f) of the Court below indicates that unpublished memoranda may not be cited as precedent. Pursuant to its Rule 13(c), the Court below will dispense with a formal opinion "where the issues occasion no need therefore. . .".

<sup>4</sup>The only mention made by Pappas of this issue occurred in a request for oral argument filed by Pappas. As noted at App. 80, this request was filed in a grossly untimely manner. In its request, Pappas suggested syndicated exclusivity as a possible topic at the proposed oral argument. It neither endorsed nor urged the grant of such relief. The Commission denied Pappas' request for an oral argument with the result that the issue was never in fact raised. The cursory reference to the matter in an untimely and unauthorized pleading cannot be viewed as a request for alternative relief.

## REASONS FOR DENYING THE WRIT

### I

#### NO VALID QUESTION IS RAISED AS TO THE COMMISSION'S JURISDICTION OVER CABLE TELEVISION

Pappas alleges as its first point that the Commission has no jurisdiction to consider the public interest in cable television but must restrict its regulatory activities in this area to protecting broadcasters. This point must fail initially since Pappas has never previously raised it either before the Commission or the Court below. The Commission as early as August 9, 1974, placed Pappas on notice that the effect of the requested relief (the prohibition of otherwise lawful distant signals) on cable television service would be a pertinent factor in resolving its waiver requests (App. 16). See also App. 29-30, where the Commission clearly stated its concern in this regard. There is accordingly no justification for Pappas' failure to raise any jurisdictional arguments it wished to interpose at an earlier stage in this proceeding.

The argument in any event is without merit. Initially, the argument is a moot point unless it is first found that Pappas has successfully demonstrated that cable carriage will result in serious injury to it. Without such a demonstration, there would be no basis for waiving the rules irrespective of the impact of such a waiver on cable. The Commission found that Pappas failed to demonstrate serious injury. This conclusion was affirmed by the Court below. There is no justification for a further rehashing of the pros and cons of the Commission's factual determinations in this respect.

There can further be no doubt the Commission has jurisdiction over signal carriage matters. *United States v.*

*Southwestern Cable Co.*, 392 U.S. 157 (1968). To the extent the Commission has jurisdiction in this area it must exercise such jurisdiction for the purpose of furthering the "public convenience, interest, or necessity," 47 U.S.C. § 303, and not for the purpose of protecting the profits of one industry. By its *Cable Television Report and Order*, 36 FCC 2d 143 (1972), the Commission found that the orderly growth of cable television is in the public interest. It also placed limits on the number of signals that may be carried to avoid any impairment of local broadcast service and further imposed on many systems (including the one in Fresno) obligations to provide public and other access services so that cable systems would affirmatively contribute to the public interest by making the cable television medium available to the general public. To the extent that cable television is consistent with the public interest, the Commission can properly take into account the impact on cable television of a requested waiver of the rules. This conclusion is reinforced by *United States v. Midwest Video Corp.*, 409 U.S. 649 (1972). Pappas' attempt at page 11 to distinguish *Midwest Video Corp.* on the grounds that there is an adequate number of television stations in Fresno is misplaced since none of these stations provide public access, a service uniquely available by cable television.



## II

NO DUE PROCESS QUESTIONS  
ARE RAISED

Pappas' second point is that it has been denied due process because the Commission has no standards governing the grant of waivers.<sup>5</sup> Its arguments in this regard assume as fact several matters that are very much in dispute, i.e., (1) that the Commission has no standards governing the showing required in a waiver request and (2) that Pappas has made a compelling showing of likely injury. Both the Commission and the Court below have rejected Pappas' position on these points. Further review would again essentially involve nothing more than a rehashing of these primarily factual issues.

With respect to the alleged lack of standards, a review of prior Commission and judicial precedent will reveal that there are ample guidelines as to the type of information to be contained in a waiver request including: (1) statistics as to how many viewers would be lost to distant stations; (2) how many rating points would be lost; (3) how many advertisers would be lost; (4) how many advertising dollars would be lost; (5) economic projections; (6) specifics regarding the station's present financial status; (7) the impact of any past CATV activity; (8) information as to the cumulative impact of prospective CATV operations; (9) information concerning such factors as probable audience, revenue, income and program service; (10) information as to the market involved and the impact of future growth in market revenues; (11) impact of program exclusivity protec-

<sup>5</sup>Pappas also alleges its rights were violated because the Commission relied on the analysis of its staff, which Pappas characterizes as *ex parte*. As noted by the Court below, this question is not properly within the scope of this appeal since it was never raised before the Commission. (App. 89). In any event, the suggestion that an administrative agency may not consider the written views of its staff is without merit, as noted by the Court below.

tion; and (12) impact of the requested relief on cable television operations.<sup>6</sup>

Pappas further contends that the Commission has acted arbitrarily by granting waivers in other cases on the basis of lesser showings. It should first be emphasized that none of the cases cited by Pappas involve requests to prohibit a cable system from carrying distant independent stations. As noted, the grant of such relief would have a drastic impact on the cable television system. The cases cited by Pappas relate to foreign language stations, educational stations and program exclusivity. In each case, the adverse impact on the cable operator from the grant of the waivers is minimal since the type of programming involved is not critical to the cable system's well-being. Furthermore, each of the cases is otherwise distinguishable from this case, as noted by the Court below with respect to the waiver granted to KAIL. (App. 88).<sup>7</sup>

Pappas fails to recognize that each request for a waiver of the rules involves a balancing between the public interest to be served by adhering to the Rule and the public interest to be served by waiving it. Clearly, the appropriate balance will vary depending on the individual facts. Where, for instance, a requested waiver would have only a minimal impact on the public interest the Rule is intended to further,

<sup>6</sup>See, e.g., *Central New York Cable TV, Inc.*, 11 FCC 2d 150 (1967); *Vumore Video Corp. of Colorado*, 12 FCC 2d 955 (1968) *aff'd sub nom. Pikes Peak Broadcasting Co. v. FCC*, 137 U.S. App. D.C. 234, 422 F.2d 671 *cert denied* 395 U.S. 979 (1969); *Spectrum Cable Systems, Inc.*, 40 FCC 2d 1019 (1973), *recon. denied*, 44 FCC 2d 867 (1974), *aff'd sub nom. Springfield Television Broadcasting Corp. v. FCC* 512 F.2d 992 (D.C. Cir. 1975); and the decisions under review in the instant proceeding, especially App. 29 and 30 where, it will be noted, *Pappas* itself cited the type of information expected by the Commission.

<sup>7</sup>With respect to KAIL, that station also objected to the carriage of two distant independents, as did Pappas (App. 3). The Commission denied this relief to KAIL, as it did to Pappas. (App. 10). Both stations received identical treatment on that issue.



the Commission could quite properly grant a waiver on a lesser showing than if the requested waiver would have a devastating impact on the public interest represented by the Rule. This is precisely the case with respect to the cases cited by Pappas.

This is illustrated by *Colby-Bates-Bowdoin Educational Telecasting Corporation v. FCC*, 534 F.2d 11 (1st Cir. 1976), relied on by Pappas to show a conflict among the Circuits. That case involved a provision of the Rules governing the carriage of out-of-state educational stations (47 C.F.R. § 76.61(d))<sup>8</sup> which provision is not involved in this case. The concern of the First Circuit was that the language of this specific provision and earlier Commission precedent suggested that local educational stations would face a lesser burden in seeking to exclude an out-of-state competitor than would ordinarily be the case. In fact, a heavy burden had been placed on the educator in *Colby*. For this reason, the First Circuit returned the case to the Commission with the suggestion that if that was how the Commission wished to proceed, it should amend its Rules to be consistent with its policy.

No similar situation applies here. The Rules permitting carriage of two distant independents contain no qualification on that right. 47 C.F.R. § 76.63(a) as it relates to 47 C.F.R. § 76.61(b). The *Cable Television Report and Order*, *supra*, at paragraphs 112 and 113, makes clear the heavy burden facing parties asking for a waiver of these Rules, which policy has been consistently enforced. See the cases cited in footnote 6, *supra*. Also, the balance of the equities is, again, completely different. Unlimited carriage of educational stations is permitted since such stations

<sup>8</sup>The Rule permits carriage of distant out-of-state educational stations "... in the absence of objection filed pursuant to § 76.7 by any local noncommercial educational station or state or local educational authority."

generally direct their programming to small, specialized audiences. Accordingly, carriage of distant educational stations is unlikely to affect the viability of commercial broadcasting. By the same token, the impact of losing the right to carry such a station would generally have a much less severe impact on a cable system than would result if the Fresno system lost the right to carry the only two distant English language commercial television stations permitted by the Commission's Rules. This is the extraordinary relief sought by Pappas.

Thus, no conflict exists between the action of the Court below and the First Circuit's decision in *Colby*. Nor does the *Colby* case support the proposition that the Commission has acted arbitrarily with regard to its rules allowing the carriage of distant independent stations.

It should finally be emphasized that the Commission did not rely upon any failure to meet Commission standards in denying Pappas special relief. The Commission thoroughly considered the facts alleged in the Cooper Study and concluded that those facts did not show that the carriage of two distant independents would undermine Pappas' ability to serve the public interest. (App. 83). Put otherwise, under the guise of urging that its due process rights have been violated, Pappas is asking this Court to substitute its judgment for that of the Commission as to the merits of the Cooper Study.

The Commission fulfilled its obligation to give Pappas' request a "hard look". *WAIT Radio v. FCC*, 125 U.S. App. D.C. 317, 418 F.2d 1153 (1969). The Court below fulfilled its limited review functions in these types of cases. *WAIT Radio v. FCC*, 149 U.S. App. D.C. 169, 459 F.2d 1203, *cert. denied*, 409 U.S. 1072 (1972). No denial of due process is involved.

## III

THERE IS NO CONFLICT WITH OTHER  
DECISIONS OF THIS COURT

The third point raised by Pappas is that the Commission's decision is in conflict with decisions of this Court because it will allegedly prohibit Pappas from providing news and public affairs programming. This point is premised on a mischaracterization of the Commission's decision. Pappas alleges that the Commission concluded that the impact on cable television was of greater concern than Pappas' inability to provide news and public affairs. In fact, however, the Commission concluded, after an exhaustive analysis of the Cooper Study, that Pappas had failed to document that the relief sought was necessary to prevent a loss of service to the public. (App. 83).

Thus, once again, review granted pursuant to this point would involve principally a rehashing of the merits of the Commission's factual determinations. The legal contention Pappas seeks to raise is irrelevant since it distorts the basis of the Commission's decision denying Pappas' Petition for Special Relief.

Pappas alleges a conflict with the decisions of this Court. In support, it cites two decisions of this Court. *Federal Communications Commission v. Sanders Bros.*, 309 U.S. 40 (1940) and *National Broadcasting Co. v. United States*, 319 U.S. 203 (1943). There is no conflict between those decisions and the decisions of the Commission and the Court below. It is also difficult to perceive the relevance of those decisions to this case.

It should also be emphasized that the record in this case does not demonstrate that Pappas presently provides any significant news and public affairs programming. It would be clearly improper for the Commission to grant drastic special relief based on programming that doesn't exist and may never exist irrespective of the Commission's decision. Nor can the Commission be expected to encourage the

tactics of a broadcaster who views its public service obligations as a hostage to be exchanged for waivers of the cable television rules.

On the other hand, the system in Fresno will provide substantial public interest services in the form of public access. Public access is available only via cable and would be lost if cable service is lost because of a waiver of the signal carriage rules.

Pappas alleges at page 17 an inconsistency between the Commission's action here and another case, *KID Brocasting Corp.*, 61 FCC 2d 1155 (1976). The relief granted in that case consisted only of a *temporary* waiver of the network nonduplication rules. 47 C.F.R. § 76.92 *et seq.* Thus, the relief granted was in no way comparable to the relief sought by Pappas. Moreover, the relief was premised on an assessment of the immediate impact of existing cable service not, as here, on a prediction as to the impact of future cable service over a ten-year period. Also, the waiver was granted in view of a unique circumstance that the Commission had determined *after a rulemaking proceeding* should call for a less stringent burden on those seeking a waiver. *Second Report and Order in Docket No. 19995*, 54 FCC 2d 229 (1975) at paragraphs 25 to 27. Accordingly, once again, the facts of *KID* are wholly distinguishable from the facts here.

## IV

THE PETITION SHOULD BE DENIED BECAUSE  
OF NON-COMPLIANCE WITH RULE 23  
OF THIS COURT

Rule 23(1)(i) requires a petitioner for certiorari to submit in an appendix "... all opinions of courts or administrative agencies in the case ...". As discussed above, Pappas has omitted from its Appendix an attachment to the Commission decision set forth at App. 70 consisting of a Com-



mission staff analysis of the Cooper Study. The staff analysis is critical to this Court's assessment of the Commission's decision since it demonstrates the exhaustive consideration that was given to the merits of the Cooper Study. Under this circumstance, a serious question is raised as to why Pappas elected to omit this critical portion of the Commission's decision from its Appendix.

Rule 23(4) states that the failure of a petitioner to present its case "with accuracy, brevity and clearness" will be grounds for denial. In addition to its omission of the staff analysis, Pappas' petition is at best disingenuous in several other respects, including (1) the assertion that KMPH is a Fresno station without also explaining that it is not so considered under the cable television rules (a fact well known to Pappas); (2) the unqualified assertion at footnote 14 that Pappas had sought syndicated program protection when Pappas well knows that assertion is contested; (3) the repeated proffering as fact of matters that are very much in dispute, such as the existence of Commission standards and the likelihood of injury to Pappas from the carriage of distant signals; and (4) repeated mischaracterizations of the Commission's decisions below, especially as discussed in the foregoing section and in the Counterstatement of the case.

The practice of Pappas of alleging as facts matters which are in dispute is particularly objectionable in Pappas' statement of the case. It is impossible for this Court to properly assess the merits of a petition if the statement of the case does not objectively apprise the Court of the pertinent facts.

Pappas alleges, for instance, at page 5 of its petition that it was hampered in preparing its waiver petition due to the absence of Commission standards. Again at page 8 of its petition, Pappas alleges as fact the absence of Commission standards and that the importation of distant signals would

prevent Pappas from providing news and public affairs programming. These matters are, of course, the ultimate issues in this proceeding. They represent merely the opinion of Pappas which has been disputed by the other parties, the Commission and the Court below.

For these reasons, the Pappas petition should be rejected for noncompliance with Rule 23.

### CONCLUSION

Pappas has failed to meet any of the criteria for the grant of certiorari as set forth in Rule 19(1)(b) of this Court. The only questions properly reviewable in this proceeding are factual ones of little general importance. The Court in the past has denied certiorari in analogous cases involving waivers of the Commission's signal carriage rules. *Pikes Peak Broadcasting Co. v. FCC*, 137 U.S. App. D.C. 234, 422 F.2d 671 cert. denied 395 U.S. 979 (1969).

Respectfully submitted,

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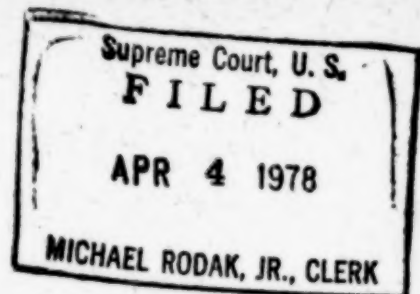
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No. 77-1101

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**In the Supreme Court of the United States**

OCTOBER TERM, 1977

PAPPAS TELEVISION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 85-89) is unreported. The opinions of the Federal Communications Commission are reported at 48 F.C.C. 2d 116, reconsideration granted in part, 50 F.C.C. 2d 340 (Pet. App. 8-33); 57 F.C.C. 2d 134 (Pet. App. 34-52); 59 F.C.C. 2d 525 (Pet. App. 59-69); 61 F.C.C. 2d 1051 (Pet. App. 70-84).<sup>1</sup>

<sup>1</sup> The staff analysis of the Cooper Study was attached to the Commission's decision as an appendix, but was not reproduced in the FCC Reports and is not included in the Petitioner's Appendix. For the convenience of the Court, we reproduce it here. App., *infra*, 18A-38A.

(1)

## JURISDICTION

The judgment of the court of appeals (Pet. App. 86) was entered on October 25, 1977. The petition for a writ of certiorari was filed, in conformity with an extension of time granted by the Court, on February 6, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## REGULATIONS INVOLVED

The pertinent provisions of the Federal Communications Commission's regulations for cable television are 47 C.F.R. 76.1, 76.5, 76.7, 76.51, 76.53, 76.54, 76.59, 76.61, 76.63, set forth in the appendix to this brief.

## QUESTION PRESENTED

Whether the Commission in denying Pappas Television, Inc., special relief from the cable television carriage rules properly determined that Pappas' ability to serve the public would not be harmed by the importation of the signals of distant independent stations.

## STATEMENT

1. The Federal Communications Commission in 1972 adopted rules governing the carriage by cable television systems of distant signals.<sup>2</sup> *Cable Television Re-*

<sup>2</sup> "Distant" signals are the television signals of stations that are located more than thirty-five miles from the cable system and are not received by any significant number of viewers in the area served by the cable system.

Until these rules were adopted the Commission had decided on a case-by-case basis how many distant stations would be carried on systems in each community. 36 F.C.C. 2d at 165.

*port & Order*, 36 F.C.C. 2d 143, modified, 36 F.C.C. 2d 326 (1972); 47 C.F.R. Part 76. These rules were designed to accommodate two competing concerns. On the one hand, the Commission sought to protect local stations from any substantial loss of viewers in the cable television audience which might result if those viewers had access to too many distant stations. On the other hand, the Commission was anxious to permit cable systems to carry some out-of-town stations not otherwise available in the community, so as to attract subscribers and investors. See *Cable Television Report & Order*, *supra*, 36 F.C.C. 2d at 170-179.

Under the rules, the number of distant stations a cable system may carry depends generally on the size of the television market in which the system operates. Cable systems within the specified zone of "major markets"<sup>3</sup> are permitted under the rules to carry at least two distant stations. By contrast, cable systems located within the specific zone of a "smaller market" may not be entitled to any distant signals if the signals of each of the three networks and one independent station are available locally. 47 C.F.R. 76.5 (f), (h), (i), 76.53, 76.59 (App., *infra*, 2A, 6A-7A, 9A-13A).<sup>4</sup>

A broadcaster who seeks restrictions on cable systems beyond those provided in the 1972 rules must petition for special relief and show, with specific factual documentation, that the importation of distant stations will cause an audience loss that will so affect station advertising revenues as to impair its

<sup>3</sup> The 100 largest TV markets are designated "major markets."

<sup>4</sup> The 101st market and below are designated "smaller markets."



ability to operate in the public interest. See 36 F.C.C. 2d at 179, 186-187; Pet. App. 75, 80-81.

2. The petitioner, Pappas Television, Inc., operates television station KMPH in Tulare, California, a town defined by the Commission's rule as a smaller market. Its signal, however, reaches beyond Tulare. Pappas opposed the applications of five different cable systems outside its specified market zone. It contended generally that the cumulative impact of potential cable operations anywhere in the entire area covered by its signal would cause its station to lose audience and revenues, and, therefore, that no system in the area should be authorized to carry distant stations.<sup>5</sup>

The Commission rejected Pappas' contentions in the first two proceedings for failure to submit the required data showing harmful impact. *Fresno Cable TV Co., Inc.*, 48 F.C.C. 2d 116, reconsideration granted in part, 50 F.C.C. 2d 340, stay denied, 52 F.C.C. 2d 249; *Hanford Cable Co.*, 48 F.C.C. 2d 132, reconsideration granted in part, 50 F.C.C. 2d 351. Pappas then sub-

<sup>5</sup> Specifically, Pappas asked the Commission to ban distant independent stations on cable systems anywhere in the Fresno "area of dominant influence" (ADI). Pet. App. 76. This is a television advertising market defined by private audience rating services. Tulare, where Pappas' station is licensed, is in one of six counties that make up this sprawling market. The term "area of dominant influence" has significance for purposes of ratings and solicitation of advertising, but is not part of FCC's regulatory program. Thus, even though KMPH is located in the Fresno ADI, the FCC rules afford it the protection given stations located in smaller markets. Moreover, Pappas' station receives the additional benefit under the rules of being carried both on cable systems within the Tulare 35-mile zone and on systems outside the zone, but within the station's area of coverage. 47 C.F.R. 76.59 (a) (1), (6), 76.54; Pet. App. 74-75.

mitted a market analysis ("Cooper Study") in opposition to two later applications of Fresno area cable systems. Because the study did not concern the impact of any one system, but attempted to predict the impact of all potential cable development throughout the Fresno market, the FCC considered it in a separate market-wide special relief proceeding, in which all the systems participated. Pet. App. 40 n. 7, 62-63, 70-71.<sup>6</sup> The Cooper Study predicted that over the next ten years CATV systems would grow greatly, that, as a result, Pappas' profits would be less than they would be without CATV, and that the station therefore might not have the resources necessary to add a news department (Pet. App. 81, 83).

The Commission declined to grant special relief to Pappas. It found that the Cooper Study overestimated the potential growth of CATV in the area and, because of dubious methodology, quite likely also underestimated future earnings. In light of these defects in a study which nonetheless predicted "growing revenues, audiences and profits for KMPH with or without competition from distant independents," the Commission was not persuaded that the relief sought was needed to prevent loss of service to the public (Pet. App. 83).

Pappas sought review of this decision, as well as of the five decisions granting certificates to CATV systems in which the Commission had denied Pappas' opposition. The court of appeals consolidated the six

<sup>6</sup> Accordingly, it granted the challenged applications for certificates, reserving the question of impact for the special relief proceeding (Pet. App. 40 n. 7).

cases and, in an unpublished memorandum, affirmed (Pet. App. 85).<sup>7</sup> The court held that the record supported the FCC's conclusion that Pappas had not made out a case of economic injury sufficient to justify waiver of the rules (Pet. App. 89).

#### ARGUMENT

The decision of court of appeals is correct; the ruling does not conflict with any decisions of this Court or any other court of appeals; and it does not present any issue warranting further review.

1. Pappas' principal argument is that the Commission has unlawfully promoted the success of CATV "not as a function ancillary to its regulation of television broadcasting, but as a function separate and apart from that regulation" (Pet. 12, 9-12). More specifically, petitioner claims error in the Commission's supposed policy of requiring stations seeking special relief from the CATV rules to show both a risk of substantial injury and lack of harm to the cable system from the proposed relief (Pet. 9, quoting Pet. App. 88).

This contention is not properly presented by this case. Pappas never raised this argument below, and it should not be considered now. *Duignan v. United States*, 274 U.S. 195, 200. Moreover, even if the issue had been raised before the court of appeals it would have been irrelevant, for the Commission's opinion makes it clear that it denied relief solely because Pappas had not shown any risk of substantial injury

<sup>7</sup> The decision applies to six cases involving six Commission orders. Pappas does not seek review of two of the decisions in this Court (C.A. D.C., Nos. 75-1115, 75-1408). Pet. 3 n. 2.

(Pet. App. 80-81). The question of harm to the CATV system was not considered and was not part of the Commission's decision. The Commission's policy is to provide relief to any broadcaster who documents his claim of harm from proposed CATV carriage of distant signals. Harm to the CATV system is relevant only in shaping effective relief for the broadcaster in such a way as to minimize injury to the cable operator (Pet. App. 14-16). Such a policy is fair to both and is fully consonant with lawful CATV regulation as approved by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157, and *United States v. Midwest Video Corp.*, 406 U.S. 649.

2. Petitioner's contention that the rejection of its claim for special relief discloses a lack of standards and is contrary to a decision of the First Circuit (Pet. 13-15) is insubstantial. The Commission's standards are sufficiently clear: the applicant for special relief must document a substantial risk that importation of distant signals will diminish his revenues to the point that his ability to serve the public is impaired. See *Cable Television Report*, *supra*, 36 F.C.C. 2d at 179; *Gerity Broadcasting Company*, 36 F.C.C. 2d 68 (1972); *Quincy Cablevision, Inc.*, 9 F.C.C. 2d 822 (1967). Of necessity, the amount and quality of proof which will meet this standard will vary from case to case. Here, applying the strict test applicable to all such objectors, the Commission found Pappas' submission unpersuasive. This is, of course, no basis for the charge that the Commission lacks a discernible standard.



Nor is the First Circuit's decision in *Colby-Bates-Bowdoin Educational Telecasting Corp. v. Federal Communications Commission*, 534 F. 2d 11 (C.A. 1), inconsistent with the decisions below. That case holds only that the Commission may not change standards without giving an adequate explanation—an issue not presented in this case at all.\*

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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April 1978.

\* On a fresh appeal, after the Commission elaborated its reasons, the order in that case was affirmed. *Id.*, No. 77-1293, C.A. 1, decided March 15, 1978.

## APPENDIX

### EXCERPTS FROM THE COMMISSION'S CABLE TELEVISION RULES, 47 C.F.R., PART 76

#### § 76.1 Purpose.

The rules and regulations set forth in this part provide for the certification of cable television systems and for their operation in conformity with standards for carriage of television broadcast signals, program exclusivity, cablecasting access channels, and related matters.

#### § 76.5 Definitions.

(a) *Cable television system* (or CATV system). Any facility that, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

NOTE: In general, each separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and single, discrete unincorporated areas)

(1A)



served by cable television facilities constitutes a separate cable television system, even if there is a single headend and identical ownership of facilities extending into several communities. See e.g., *Telerama, Inc.*, 3 FCC 2d 585 (1966); *Mission Cable TV, Inc.*, 4 FCC 2d 236 (1966).

\* \* \* \* \*

(f) *Specified zone of a television broadcast station.* The area extending 35 air miles from the reference point in the community to which that station is licensed or authorized by the Commission. A list of reference points is contained in § 76.53. A television broadcast station that is authorized but not operating has a specified zone that terminates eighteen (18) months after the initial grant of its construction permit.

(g) *Major television market.* The specified zone of a commercial television station licensed to a community listed in § 76.51, or a combination of such specified zones where more than one community is listed.

(h) *Designated community in a major television market.* A community listed in § 76.51.

(i) *Smaller television market.* The specified zone of a commercial television station licensed to a community that is not listed in § 76.51.

\* \* \* \* \*

(k) *Significantly viewed.* Viewed in other than cable television households as follows: (1) For a full or partial network station—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station—a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. See § 76.54.

NOTE: As used in this paragraph, "share of viewing hours" means the total hours that noncable television households viewed

the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and "net weekly circulation" means the number of noncable television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total noncable television households in the survey area.

\* \* \* \* \*

(n) *Independent station.* A commercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the three major national television networks.

\* \* \* \* \*

(jj) *Local news program.* Local programming originated or produced by a station, or for the production of which the station is primarily responsible, employing live talent more than 50 percent of the time which includes reports dealing with current local events including weather and stock market reports.

(kk) *Specialty station.* A commercial television broadcast station that generally carries foreign-language, religious, and/or automated programming in one-third of the hours of an average broadcast week and one-third of weekly prime-time hours.

#### § 76.7 *Special relief.*

(a) On petition by a cable television system, a franchising authority, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by a certificate of

service on any cable television system, franchising authority, station licensee, permittee, or applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(3) If a petition involves more than one cable television community, three (3) copies of it should be filed for each such community, in addition to the number of copies otherwise required to be filed pursuant to § 1.51 of this chapter.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. For good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's certificate of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied on.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served on all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied on. For good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be afforded any party pending the hearing and the nature of any such temporary relief.

(g) Where a petition for waiver of the provisions of §§ 76.57(a), 76.59(a), 76.61(a), or 76.63(a), is filed within fifteen (15) days after a request for carriage, a cable television system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the question of temporary relief pending further proceedings.

(h) On a finding that the public interest so requires, the Commission may determine that a cable television system operating or proposing to operate in a community located outside of the 48 contiguous states shall comply with provisions of Subparts D, F, and G of this part in addition to the provisions



thereof otherwise applicable. In such instances, any additional signal carriage that is authorized shall be deemed to be pursuant to the appropriate provision of §§ 76.61(b) or 76.63(a) (as it relates to § 76.61(b)).

(i) If the relief requested could have been earlier filed pursuant to § 76.27, the petition will be dismissed unless the petitioner shows at least one of the following:

(1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters pursuant to § 76.27.

(2) The facts relied on were unknown to petitioner until after his last opportunity to present such matters, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity.

(3) Consideration of the facts relied on is required in the public interest.

#### SUBPART D—CARRIAGE OF TELEVISION BROADCAST SIGNALS

##### § 76.51 *Major television markets.*

For purposes of the cable television rules, the following is a list of the major television markets and their designated communities:

\* \* \* \* \*

(72) Fresno, Calif.

##### § 76.53 *Reference points.*

To determine the boundaries of the major and smaller television markets (defined in § 76.5), the following list of reference points for communities having licensed television broadcast stations and/or outstanding construction permits shall be used. Where a community's reference point is not given, the geo-

graphic coordinates of the main post office in the community shall be used.

State and community	Latitude			Longitude		
*	*	*	*	*	*	*
California:						
Bakersfield.....	35	22	31	119	01	16
Chico.....	39	44	07	121	49	57
Concord.....	37	58	46	122	01	51
Corona.....	33	52	35	117	33	56
El Centro.....	32	47	25	115	32	45
Eureka.....	40	48	08	124	09	46
Fontana.....	34	05	45	117	26	29
Fresno.....	36	44	12	119	47	11
Guasti.....	34	03	48	117	35	10
Hanford.....	36	19	51	119	38	48
Los Angeles.....	34	03	15	118	14	28
Modesto.....	37	38	26	120	59	44
Monterey.....	36	35	44	121	53	39
Oakland.....	37	48	03	122	15	54
Palm Springs.....	33	49	22	116	32	46
Redding.....	40	34	57	122	23	34
Sacramento.....	38	34	57	121	29	41
Salinas.....	36	40	24	121	30	25
San Bernardino.....	34	06	30	117	17	28
San Diego.....	32	42	53	117	09	21
San Francisco.....	37	46	39	122	24	40
San Jose.....	37	20	16	121	53	24
San Luis Obispo.....	35	16	49	120	39	34
San Mateo.....	37	34	08	122	19	16
Santa Barbara.....	34	25	18	119	41	55
Santa Maria.....	34	57	02	120	26	10
Stockton.....	37	57	30	121	17	16
Tulare.....	36	12	31	119	20	35
Ventura.....	34	16	47	119	17	22
Visalia.....	36	19	46	119	17	30



*§ 76.54 Significantly viewed signals; method to be followed for special showings.*

(a) Signals that are significantly viewed in a county (and thus are deemed to be significantly viewed within all communities within the county) are those that are listed in Appendix A of the memorandum opinion and order on reconsideration of the Cable Television Report and Order (Docket 18397 et. al.), FCC 72-530.

(b) Significant viewing in a cable television community for signals not shown as significantly viewed under paragraphs (a) or (d) of this section may be demonstrated by an independent professional audience survey of noncable television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September. If two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure of at least one standard error above the required viewing level. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must be submitted and the combined surveys must result in an average figure at least one standard error above the required viewing level.

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community is located, in whole or in part, and on all cable systems, franchisees, and franchise applicants in the

cable community at least thirty (30) days prior to the initial survey period. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

(d) Signals of television broadcast stations not encompassed by the surveys (for the periods May 1970, November 1970 and February/March 1971) used in establishing Appendix B of the *Memorandum Opinion and Order on Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326 (1972), may be demonstrated as significantly viewed on a county-wide basis by independent professional audience surveys which cover three separate, consecutive four-week periods and are otherwise comparable to the surveys used in compiling the above-referenced Appendix B; *Provided, however*, That such demonstration shall be based upon audience survey data for the first three years of the subject station's broadcast operations.

*§ 76.59 Provisions for smaller television markets.*

A cable television system operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such cable television system may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the system is located, in whole or in part;

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

(3) Commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community of the system is located, in whole or in part;

(4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vt.—Plattsburg, N.Y., television market);

(5) Television translator stations with 100 watts or higher power serving the community of the system and, as to cable systems that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the system. In addition, any cable system may elect to carry the signal of any noncommercial educational translator station;

(6) Commercial television broadcast stations that are significantly viewed in the community of the system. See § 76.54.

(b) Any such cable television system may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of one independent television

station: *Provided, however,* That, in determining how many additional signals may be carried, any authorized but not operating television broadcast station that, if operational, would be required to be carried pursuant to paragraph (a)(1) of this section, shall be considered to be operational for a period terminating 18 months after grant of its initial construction permit.

(c) In addition to the noncommercial educational television broadcast signals carried pursuant to paragraph (a) of this section, any such cable television system may carry the signals of any noncommercial educational stations that are operated by an agency of the State within which the system is located. Such system may also carry any other noncommercial educational signals, in the absence of objections filed pursuant to § 76.7 by any local noncommercial educational station or State or local educational television authority.

(d) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (c) of this section, any such cable television system may carry:

(1) Any specialty station and any station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior Commission notification or approval in the certificating process.

(2) Any television station broadcasting a network program that will not be carried by a station normally carried on the system. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior Commission notification or approval in the certificating process.



(3) Any television broadcast station during the period from sign-off of the last television broadcast station which the cable television system must carry pursuant to § 76.59(a), or from 12:00 a.m. in the Central and Mountain Time Zones and 1:00 a.m. in the Eastern and Pacific Time Zones, whichever occurs first, to the sign-on of the first station which the cable television system must carry pursuant to § 76.59(a): *Provided, however*, That a cable television system may carry a program to its completion; *And provided further*, That this subsection does not authorize carriage in the manner described above whenever a television broadcast station that the cable television system must carry pursuant to § 76.59(a) broadcasts continuously and does not sign-off during the hours from 12:00 a.m. to 6:00 a.m. Carriage of such additional television signals shall not require prior approval in the certificating process and shall be consistent with the network nonduplication protection and syndicated exclusivity rules of Subpart F of this part.

(4) Any television station broadcasting a network news program at any time when no station regularly carried is broadcasting the same program and when no station licensed to the market in which the system is located is broadcasting a local news program. Carriage of such additional stations shall be for the duration of the news program only and shall not require prior Commission notification or approval in the certificating process.

(e) Where the community of a cable television system is wholly or partially within both one of the first 50 major television markets and a smaller television market, the carriage provisions for the first 50 major markets shall apply. Where the community of a system is wholly or partially within both one of the

second 50 major television markets and a smaller television market, the carriage provisions for the second 50 major markets shall apply.

*§ 76.61 Provisions for first 50 major television markets.*

A cable television system operating in a community located in whole or in part within one of the first 50 major television markets listed in § 76.61(a) shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such cable television system may carry, or on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the system is located in whole or in part: *Provided, however*, That where a cable television system is located in the designated community of a major television market, it shall not carry the signal of a television station licensed to a designated community in another major television market, unless the designated community in which the cable system is located is wholly within the specified zone (see § 76.5(f)) of the station, except as otherwise provided in this section;

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

(3) Television translator stations with 100 watts or higher power serving the community of the system and, as to cable systems that commence operations or expand channel capacity after March 30, 1972, non-commercial educational translator stations with 5 watts or higher power serving the community of the system. In addition, any cable system may elect to



carry the signal of any noncommercial educational translator station;

(4) Television broadcast stations licensed to other designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Ky., television market);

(5) Commercial television broadcast stations that are significantly viewed in the community of the system. See § 76.54.

(b) Any such cable television system may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of three independent television stations: *Provided, however,* That in determining how many additional signals may be carried, any authorized but not operating television broadcast station that, if operational, would be required to be carried pursuant to paragraph (a)(1) of this section, shall be considered to be operational for a period terminating 18 months after grant of its initial construction permit.

(1) Whenever, pursuant to this section, a cable television system is permitted to carry three additional independent signals, one of these signals must be that of a UHF television broadcast station.

(2) Whenever, pursuant to Subpart F of this part, a cable television system is required to delete a television program on an independent signal carried pursuant to this section, or a program on such a signal is primarily of local interest to the distant community (e.g., a local news or public affairs program), such system may, consistent with the program exclusivity rules of Subpart F of this part, substitute a program from any other television broadcast station. A pro-

gram substituted may be carried to its completion, and the cable system need not return to its regularly carried signal until it can do so without interrupting a program already in progress.

(c) After the service standards specified in paragraph (b) of this section have been satisfied, a cable television system may carry two additional independent television broadcast signals. *Provided, however,* That the number of additional signals permitted under this paragraph shall be reduced by the number of signals added to the system pursuant to paragraph (b) of this section.

(d) In addition to the noncommercial educational television broadcast signals carried pursuant to paragraph (a) of this section, any such cable television system may carry the signals of any noncommercial educational stations that are operated by an agency of the State within which the system is located. Such system may also carry any other noncommercial educational signals, in the absence of objection filed pursuant to § 76.7 by any local noncommercial educational station or State or local educational television authority.

(e) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (d) of this section, any such cable television system may carry:

(1) Any specialty station and any station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior Commission notification or approval in the certificating process.

(2) Any television station broadcasting a network program that will not be carried by a station normally

carried on the system. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior Commission notification or approval in the certificating process.

(3) Any television broadcast station during the period from sign-off of the last television broadcast station which the cable television system must carry pursuant to § 76.61(a), or from 12:00 a.m. in the Central and Mountain Time Zones and 1:00 a.m. in the Eastern and Pacific Time Zones, whichever occurs first, to the sign-on of the first station which the cable television system must carry pursuant to § 76.61(a); *Provided, however,* That a cable television system may carry a program to its completion; *And provided further,* That this subsection does not authorize carriage in the manner described above whenever a television broadcast station that the cable television system must carry pursuant to § 76.61(a) broadcasts continuously and does not sign-off during the hours from 12:00 a.m. to 6:00 a.m. Carriage of such additional television signals shall not require prior approval in the certificating process and shall be consistent with the network nonduplication protection and syndicated exclusivity rules of Subpart F of this part.

(4) Any television station broadcasting a network news program at any time when no station regularly carried is broadcasting the same program and when no station licensed to the market in which the system is located is broadcasting a local news program. Carriage of such additional stations shall be for the duration of the news program only and shall not require prior Commission notification or approval in the certificating process.

(f) Where the community of a cable television system is wholly or partially within both one of the first 50 major television markets and another television market, the provisions of this section shall apply.

*§ 76.63 Provisions for second 50 major television markets.*

(a) A cable television system operating in a community located in whole or in part within one of the second 50 major television markets listed in § 76.51 (b) shall carry television broadcast signals only in accordance with the provisions of § 76.61, except that in paragraph (b) of § 76.61, the number of additional independent television signals that may be carried is two (2).

(b) Where the community of a cable television system is wholly or partially within both one of the second 50 major television markets and one of the first 50 major television markets, the carriage provisions for the first 50 major markets shall apply. Where the community of a system is wholly or partially within both one of the second 50 major television markets and a smaller television market, the provisions of this section shall apply.



## AN EVALUATION OF THE COOPER STUDY \*

### SUMMARY

Pappas Television, Inc. submitted the "Cooper Study" in its "Petition For Special Relief" against the importation of distant independent signals by cable television systems located within the Fresno, California Area of Dominant Influence (ADI). Thereafter, in rebuttal to the findings and conclusions reached in the "Cooper Study", Fresno Cable TV Co., Inc. submitted an analysis prepared by Edward Shafer, an economic consultant. In response to Mr. Shafer's analysis, Mr. Cooper submitted detailed comments (hereinafter "Cooper Study II"). A summary of the two Cooper studies and staff's evaluation of these studies follows:

### PURPOSE OF COOPER STUDIES

The purpose of the Cooper Study is to estimate the degree of impact that cable television systems within the Fresno market, carrying two distant independent signals, will have on the total audience and revenues of the Tulare independent station (KMPH).

### PREDICTIONS MADE IN THE COOPER STUDIES

Cable television penetration in the Fresno ADI will grow from the present level of 6% to between 45% and 55% in 1985 ("Cooper Study" p. 5.)

\* This evaluation was prepared in connection with the Commission's ruling in *Pappas Television, Inc.*, FCC 76-953, — FCC 2d — (1976).

Averaged over the entire Fresno ADI, it is estimated that KMPH's CATV audience share would be 43% less than its non-CATV audience share in 1985. It is predicted that KMPH's non-CATV share of audience would increase from the present level of 9% to 13% in 1985. ("Cooper Study", p. 10.).

Cooper submitted two different estimates of revenue impact on KMPH. He originally predicted that the importation of two distant independent signals would cause KMPH's revenue to be 11.7% lower at 50% cable television penetration than if cable television were not allowed to carry any distant independent signals. This prediction was based on a direct relationship between "share of local audience" and "share of market revenue." ("Cooper Study", p. 12.). The second estimation for 1985 produced a table as follows:

Cable television penetration	Estimated KMPH			Percent revenue loss
	Share of local audience (percent)	Share of revenue (percent)	Revenue	
6 percent.....	13. 7	18. 15	\$2, 631, 400	-----
50 percent.....	12. 1	16. 71	2, 422, 600	- 7. 9
60 percent.....	11. 8	16. 43	2, 382, 000	- 9. 5

This new estimate after a review of the earlier prediction was based on a finding that actually KMPH's share of revenue has been higher than its share of audience. ("Cooper Study II", p. 25.)

It is estimated that expenses will increase from the present \$1,503,217 to \$2,251,642 by 1985. At this rate, it is predicted that KMPH would have a profit of \$379,758 with no importation of distant independent signals, \$170,958 with 50% cable television penetration, and \$130,358 with 60% cable television penetration. ("Cooper Study II", p. 27.)



Cooper estimates, that if KMPH elected to provide local news programming, the additional expense would be \$346,248 by 1985. Although KMPH does not provide news service presently, Cooper predicts the station cannot earn a profit by 1985 if it elects to provide a local news program, unless the importation of distant signals is prohibited.

#### STAFF EVALUATION

There are major research errors in the Cooper study which invalidate the results. The FCC signal carriage rules are misinterpreted, which significantly inflates his prediction of impact. Cooper did not realize that CATV systems in nearly 20% (in population) of the Fresno ADI are prohibited by the FCC rules from carrying any distant independent signals. Throughout the study, Cooper fails to use acceptable statistical procedures normally used in economic projections. Many of his critical assumptions are not properly supported, if supported at all. Furthermore, his projections cannot be relied upon because they assume extreme conditions that are not likely to develop within the next ten years. A full discussion of Cooper's major predictions is in the text of this report. The following are some examples of weaknesses in the Cooper Study.

His use of the Bakersfield ADI in predicting future cable penetration for the Fresno ADI overlooks substantial dissimilarities between the two markets. Cooper limits the ADI research to Bakersfield, a market operated different from the Fresno market. Characteristics of the Fresno market such as the high percentage of rural population suggest that dramatic changes must occur before a 50% CATV penetration will be reached in the Fresno market.

Cooper's assumptions regarding the percentage of fractionalization of cable television viewing for KMPH in the Fresno ADI, are based solely on KMPH's non-CATV and CATV viewing in the Bakersfield market. Aside from the fact that the use of a single example is not a reliable statistical approach, there are several other reasons why Bakersfield is not a good example for estimating fractionalization in Fresno. The major reason is that the Bakersfield ADI consists only of a portion of one county, contrasting significantly from the six counties in the Fresno ADI. Therefore, there are no adjustments for the varying degrees of KMPH's over-the-air signal quality within the larger Fresno ADI.

In the process of estimating revenues for KMPH in 1985, Cooper uses a "trend line" model to predict the total revenues of all television stations in the Fresno ADI. The statistical error of forecast for this model is extremely large which allows little confidence for the projected results. After total revenues are projected for the Fresno ADI, Cooper uses a table of revenue/audience ratios which relate KMPH's "share of local audience" to its "share of total market revenues." However, Cooper does not support the table of revenue/audience ratios with any data or analysis. Since there is no verification of this critical stage in his forecasting process, absolutely no reliance can be given to this model.

In summary, the Bureau staff finds no indication from this Cooper Study that KMPH represents a hardship case which warrants special waivers of the FCC signal carriage rules. Cooper's analysis predicts a CATV impact of -7.9% on WMPH's revenues by 1985, but this research methods are rudimentary and highly suspect. However, it is not disputed that

KMPH will soon be a profitable station with a secure audience base. Moreover, in view of the present low CATV penetration for that market and KMPH's growing audience, there is no apparent need for immediate relief.

#### DETAILED ANALYSIS OF COOPER'S CONCLUSIONS

##### 1. A. PREDICTED 50 PERCENT CATV PENETRATION BY 1985

###### *Basis for Cooper's Predictions*

Three guidelines are used by Cooper to estimate the percentage of households which might subscribe to CATV service in the Fresno ADI by 1985. A comparison with the Bakersfield ADI is used as one guideline because it is also served by three UHF network affiliates. Cooper notes that CATV penetration in the Bakersfield ADI reached 52% of the television households by Fall, 1974. A comparison with Porterville, a community located within the Fresno ADI, is used as another guideline. Cooper notes that after seven years of operation, the CATV system in Porterville achieved a 54.5% penetration level. As a third guideline, Cooper cites the Rand Corporation study entitled "Prospects for Cable in the Top 100 Markets." He interprets the Rand model to predict a range of 30% to 50% CATV penetration for markets with local and distant signal conditions similar to those which exist and are proposed for the Fresno vicinity. From these three guidelines, Cooper predicts that by 1985, CATV penetration within the Fresno ADI will be about 50% of the television households.

###### *Staff evaluation*

Cooper's reliance on a comparison with the Bakersfield ADI does not follow acceptable statistical proce-

dures normally used in economic projections. Similar and dissimilar characteristics of the Bakersfield and Fresno markets are not identified, other than to note that both are markets with all local stations having UHF channel assignments. There is no explanation for the present large difference in cable penetration of both markets. (6.3% in the Fresno ADI and 52% in the Bakersfield ADI). By limiting the ADI research to Bakersfield, statistical sampling theory is completely ignored. Other markets are not examined for similarity so that a statistical universe for such markets can be established and studied. In predicting a 50% CATV penetration level for the Fresno ADI by 1985, Cooper assumes an accelerated CATV growth nearly five times that experienced in this market since 1970.<sup>1</sup> Cooper gives no analysis which explains the reason or cause for this predicted dramatic upturn in CATV growth. Cooper used Porterville as an example showing that it is possible for a cable system to reach a 50% penetration level within seven years. A penetration level of 50% is common for communities the size of Porterville. However, the growth rate and penetration rate of a single community cannot be applied to an ADI as a whole, because many areas are not suitable for CATV.

Cooper misinterpreted the Rand Model by applying it to an entire market. The Rand Model, cited by Cooper, is designed to estimate consumer demand for cable television services, if a cable system were to exist in an individual community. Even if the Rand Model were to predict a 50% CATV penetration rate

<sup>1</sup> CATV penetration in the Fresno ADI has grown from .8% in 1970 to 6.3% in 1975.



for a given community, it should not be interpreted that a cable system would be economically feasible for that community. In order to estimate the economic feasibility of a cable system the Rand model must be used in conjunction with a cost model. The Comanar-Mitchell cost data implies that a cable system in a suburb cannot fall very short of fifty subscribers per mile of cable if it is to be a viable investment. This means a minimum population density of about 2,000 persons per square mile at 50 percent penetration, and of about 1,400 persons per square mile at 75 percent.<sup>2</sup> Thus, if the Rand model predicts a consumer demand for cable television service such that a 50% penetration level can be achieved for each community within an ADI, it does not mean that the entire ADI will have a 50% penetration level, because many areas will not be economically feasible for CATV. An [sic] Cooper indicated in his study<sup>3</sup>, there are rural areas within the Fresno ADI which are not economically feasible for CATV.

The Bureau staff reviewed the Fresno ADI for characteristics which might explain its present low CATV penetration rate. The most obvious reason is that this area has a very large rural population which is not economically feasible for CATV. A breakdown of the counties in the Fresno market by the percentage rural population<sup>4</sup> follows:

<sup>2</sup> Roger G. Noll, Morton J. Peck, and John J. McGowan, *Economic Aspects of Television Regulation* (The Brookings Institution, Washington, D.C., 1973), pp. 159-160.

<sup>3</sup> Cooper Study, p. 6.

<sup>4</sup> The U.S. Bureau of Census defines urban areas to be places of 2,500 inhabitants or more incorporated as cities, villages, boroughs, and towns. *1970 Census of Population* (Volume I, Part A, Section 1), p. XII.

*Fresno ADI*

Counties	1960			1970		
	Total population	Rural population	Percent rural	Total population	Rural population	Percent rural
Fresno.....	365, 945	119, 702	33	413, 053	103, 182	25
Kings.....	49, 954	29, 137	59	64, 610	28, 416	44
Madera.....	40, 468	21, 513	53	41, 519	21, 126	51
Mariposa.....	5, 064	5, 064	100	6, 015	6, 015	100
Merced.....	90, 446	57, 788	64	104, 629	52, 357	50
Tulare.....	168, 403	94, 289	56	188, 322	86, 693	46

The above table illustrates that five out of six counties in the Fresno ADI are largely rural. This contrasts significantly from the Bakersfield ADI,<sup>5</sup> which was only 18% rural in 1970 and 22% rural in 1960. Furthermore, the city of Bakersfield and immediate suburbs account for 86% of the population within its ADI. Therefore, most of the cable television viewers within the ADI are subscribers of the two systems in the Bakersfield city vicinity. There are no predominant urban areas at the Bakersfield level within the Fresno ADI.<sup>6</sup>

This is not common for rural communities (of less than 2,500 persons) to have cable television in areas where all three network signals and one independent signal can be obtained off-the-air. Thus, it is not surprising to find that there is low cable television penetration in the Fresno ADI. A breakdown of the Fresno ADI showing cable penetration by county gives a better understanding of the present low number of CATV subscribers in this market.

<sup>5</sup> The Bakersfield ADI is very small, covering only a portion of one county. It consists of all census divisions of Kern County except for the East Kern and Tehachapi divisions.

<sup>6</sup> Fresno, the largest city within its ADI, comprises only twenty-one percent of the population.



Counties	1975 TVHH	1975 CATV HH	Percent CATV penetration	Percent urban population	CATV penetration of urban population
Fresno.....	143, 900	0	-----	75	-----
Kings.....	20, 500	858	4	56	7
Madera.....	14, 200	0	-----	49	-----
Mariposa.....	2, 700	318	12	0	-----
Merced.....	35, 800	9, 449	26	50	53
Tulare.....	63, 900	6, 570	11	54	19
Total.....	281, 000	17, 195	6	64	9

This table indicates that the cable television penetration is high for the urban areas of Merced and Tulare Counties. Because Mariposa and Madera counties are relatively small and rural counties, cable television is predictably small.

Fresno is the largest, most urbanized county in its ADI. However, cable television is not yet present in Fresno county. One reason for this is that there have been abnormal delays in the process of obtaining a franchise and a certificate of compliance for the city of Fresno. If we assume that these delays had not occurred, and if we assure [sic] further that the city were completely wired by cable and also 50% of the homes passed would subscribe to the service, the cable systems would have nearly 34,000 subscribers. This would increase the present CATV penetration to 18% of all television homes in the entire Fresno ADI.<sup>7</sup> Because a large portion of the remaining urban population in the Fresno ADI, consists of small towns, many additional cable systems would have to

<sup>7</sup> There are approximately 204,000 persons or 68,000 homes in the Fresno and Clovis metropolitan areas. By adding 34,000 subscribers to the existing 17,000 subscribers, the penetration would be eighteen percent for the ADI.

be built before a 50% cable penetration could be approached for the market as a whole.

There are many other factors to be considered in a forecast of ADI CATV penetration. If there are not yet any prospective franchisee's [sic] for many towns located within the ADI, the forecaster could investigate the reasons for this status so as to add reliability to his final prediction. The forecaster should consider that the process of obtaining a franchise agreement usually takes at least a year and often extends to several years. Once a franchise agreement is reached, a certificate of compliance must be obtained from the Federal Communications Commission. This process is also subject to delay depending upon the circumstances. In the Fresno ADI, there are 20 small towns (population 2,500 to 10,000) which do not have cable television and for which no application for a certificate of compliance has been filed. (See Appendix A).

Other factors to be considered in predicting cable television penetration are the cost, and the delays inherent in constructing a cable television system. Such delays often prevent a cable television system from reaching its full potential of subscribers until 3 to 5 years after construction begins. Furthermore, it is not always feasible to wire an entire town. For example, physical characteristics of the community or zoning codes may require that the distribution plant be underground. This may not be economically feasible for such areas.

Our analysis indicates a 50% cable penetration level is not considered as likely by 1985 unless dramatic changes occur within the market. The trend in urbanization would have to increase at a more rapid rate than in the past. Cooper noted that the California State Department of Finance predicted the

market to be 69.3% urban areas by 1985.\* This would require nearly a 70% penetration of urban penetration to reach a 50% penetration level for the entire ADI. Nearly every town would have to obtain a franchise agreement and certificate of compliance within at least the next 5 to 7 years to allow for the construction time to build each system. Every town would have to be completely wired even where underground construction is necessary or achieve a larger than 50% subscription rate of homes passed by cable. All these changes are not impossible. In fact the advent of new technologies and new services may increase penetration levels substantially in the near future. But it is impossible that all these events will occur within the next ten years, given the present evidence.

## 2. ESTIMATED CUMULATIVE IMPACT ON KMPH'S AUDIENCE

### *Basis for Cooper's Prediction*

Cooper constructs a model to estimate the cumulative impact of cable television viewing on KMPH's total 9 AM to Midnight audience ratings. Aside from basing the model on a predicted 50% CATV penetration for the Fresno ADI by 1985, three other critical assumptions are made. One assumption is that the impact of two distant independent signals being carried by CATV, along with the other distant signals, would cause KMPH's CATV audience share to be 43% lower than its non-CATV audience share. This 43% impact estimation is based on the CATV and non-CATV viewing of KMPH in the Bakersfield ADI. Another assumption is that the CATV systems within the Fresno ADI will import an average of two strong, distant independent signals. He bases this con-

\* Cooper Study, p. 6.

clusion on the premise that all CATV systems will carry the maximum number of signals allowable by the FCC rules. The third assumption is that KMPH will have a 13% share of the non-CATV audience in the Fresno ADI by 1985. This audience share prediction is based on the present audience shares of three western independent stations that have been in operation for at least fifteen years.

By using the above assumption, Cooper calculates the following as KMPH's share of audience by 1985.

[In percent]		
	In non-CATV households	In CATV households
KMPH.....	13	7.4
Local network affiliates.....	77	62.5
Other local stations.....	5	2.9
Other outside stations.....	5	27.2
Total.....	100	100.0

Thus, according to Cooper, KMPH's share-of-audience based on all television households in the Fresno ADI would be 10.2%, which would be 21.5% lower than its non-CATV audience share.

### *Staff Evaluation*

Cooper employs a unsophisticated design for his audience impact model. Although simple models are often used successfully in for short-run prediction, there are many complex, dynamic factors which influence the size of audience in any given television market over the long-run period of ten years. It is likely that a more elaborate model is needed for making reliable predictions of a selected television station's long-run audience. However, Cooper's model is also weak in areas other than its design. Cooper makes a number of serious research errors in the



process of arriving at each of his critical assumptions. These errors include poor sample selection, inadequate sample size, and misinterpretation of data.

Cooper bases the percentage of fractionalization of CATV viewing for KMPH in the Fresno ADI solely on KMPH's non-CATV and CATV viewing in the Bakersfield ADI. Using a single sample observation for a critical indicator is an extremely unreliable practice for forecasting. It inherently assumes, in this case, that television viewing is identical in every county within KMPH's signal range. Yet, Cooper provides no evidence that consistent viewing patterns throughout the Fresno ADI exist. There are several factors which may cause television viewing in each county to differ, affecting the percentage of fractionalization of KMPH's audience; factors such as the number and quality of signals received off-the-air and the number and type of signals carried by CATV.

The following illustration concerning the varying degrees of KMPH's signal quality over the counties within the Fresno ADI and the Bakersfield ADI, indicates that CATV may have a different impact on the station's audience depending on location. Kern County West (the Bakersfield ADI) is almost entirely inside KMPH's Grade A contour. In Kern County West, KMPH's off-the-air net weekly circulation is 31%, and its closest off-the-air independent competitor is KTLA, which receives a 6% off-the-air net weekly circulation. Mariposa, a small county within the Fresno ADI, is located almost entirely outside of KMPH's Grade B contour. In Mariposa county, KMPH receives an off-the-air net weekly circulation of only 5%, and its closest independent competitor is KTVU, which receives an off-the-air net weekly circulation of 35 percent. Since Mariposa receives such a poor signal from KMPH, it is conceivable that

CATV may increase KMPH's audience in that county.

The difference in signal carriage requirements for the markets also indicates that Bakersfield cannot be relied upon as an example by which to estimate the percentage of fractionalization of KMPH's audience in the Fresno ADI. The number of allowable independent signals for CATV carriage for the existing CATV systems in the Bakersfield ADI differ substantially from that which is allowable for prospective CATV systems in the majority of the Fresno ADI. The CATV systems in Bakersfield carry four strong, independent stations other than KMPH. The prospective CATV systems in most of the Fresno ADI will not be allowed to carry more than two distant independent signals. Cooper made an adjustment for this, but it is not verified. This further stresses the need for more observations of fractionalization.

Cooper's assumption, that CATV systems within the Fresno ADI will import an average of two strong, distant independent signals, is based on a misinterpretation of the maximum independent signals allowable by FCC rules. Cooper made the following approximations:

Area	Population Share of Fresno ADI (percent)	Allowable distant independent signals
Fresno 35 mile zone.....	68.4	2
Tulare 35 mile zone, not overlapped by Fresno 35 mile zone.....	18.9	1
Other areas within ADI, but outside Fresno and Tulare 35 mile zones.....	12.4	4

A simple weighted average indicates that two distant signals could be carried by CATV in the Fresno



ADI. However, since KMPH is a "must carry" signal in the Hanford and Tulare 35-mile zone (not overlapped by Fresno 35-mile zone) no other independent signal is allowed to be carried by CATV systems within those zones. Therefore Cooper did not realize that CATV systems in nearly 20% (in population) of the Fresno ADI are prohibited by FCC rules from carrying any distant independent signals.<sup>9</sup>

Cooper also failed to consider that many CATV systems do not carry the maximum allowable signals. As can be seen in the chart below many CATV systems in the Fresno ADI do not carry the maximum number of independent signals allowed by FCC rules.

CATV system	Number of independent signals carried	Number of independent signals allowed
Avenal.....	0	(1)
El Portal.....	1	(1)
Los Banos.....	3	(1)
Mariposa.....	0	(1)
Merced.....	3	(1)
Porterville.....	4	<sup>2</sup> 4
Three River.....	0	0
Woodlake.....	0	0

<sup>1</sup> Unlimited.

<sup>2</sup> Grandfathered.

NOTE.—This chart excludes the carriage of KMPH as a distant independent signal.

One reason that CATV systems do not carry the maximum allowable signals is that the signals are not available off-the-air. Therefore, the signals have to be brought in via common carrier. Many small systems cannot afford to pay the set rates of the common carrier, and therefore, do not carry as many signals

<sup>9</sup> There are no strong distant independent signals that are significantly viewed in those zones.

as allowed by the rules. Also, common carriers do not always carry enough signals to fill the maximum complement of signals. In general, it is not uncommon for CATV systems to carry less than the maximum number of allowable independent signals.

Cooper's prediction that KMPH's audience share will be 13% by 1985, is based on the following chart:

On-air date	Leading independent	TV market	Share of audience 9 a.m. to midnight (percent)	Other independent stations on the air
1971.....	KMPH	Fresno-Visalia...	9	KFTV 21, KAIL 53.
1968.....	KTXL	Sacramento-Stockton.	9	KMUV 31.
1958.....	KTVU	Oakland.....	12	KBHK 44, KEMO 20, KVOF 38.
1949.....	KPHO	Phoenix.....	16	KPAZ 21.
1952.....	KPTV	Portland.....	14	KVDO.

Cooper bases this estimate on the share of audience levels achieved by the older independent stations in this small table. He points out that this estimate is an "educated guess", and KMPH's share could be affected by increased competition from KFTV and KAIL.<sup>10</sup>

It must be stressed that Cooper's prediction, of a 13% share for KMPH by 1985, should only be considered as a gross approximation. There are many other factors which can affect KMPH's off-the-air audience share, such as KMPH increasing its signal strength or improving its program quality; or such as the additions of new independent signals overlapping the Fresno market from adjacent markets, or im-

<sup>10</sup> KAIL left the air April 17, 1973.

proved programming from local network stations. These factors can have a significant effect on increasing or decreasing KMPH's audience share in the Fresno market. Many of these factors already exist in other markets. The following table illustrates the wide range of audience shares obtained by mature independent stations.

Date operation began	Independent station	TV market	Channel	1976 9 a.m. to midnight share
1959	KPLR	St. Louis	11	10
1959	WVTV	Milwaukee	18	11
1952	KWGN	Denver	2	11
1967	WTCO	Atlanta	17	13
1949	WTTV	Indianapolis	4	15
1955	KTVT	Dallas	11	16
1953	WTCN-TV	Minneapolis	11	17
1967	KVVU-TV	Las Vegas	5	17

If Cooper were to expand his sample and use sophisticated statistical models, a more reliable prediction would be possible. Since Cooper relates revenue with share of audience, this assumption is a critical part of his analysis. If KMPH's off-the-air share of audience in 1985 becomes 12 or 14 instead of the predicted 13, according to Cooper's model, this would make a significant difference in the station's profit margin.

### 3. A PREDICTED 79 PERCENT IMPACT ON KMPH'S REVENUE

#### *Basis for Cooper's Prediction*

Cooper's methodology in predicting CATV impact on KMPH's revenue involves three stages. First, total television revenues of the Fresno ADI are forecasted

for 1985 by using the "trend line" mathematical method applied to the market's revenue trend for the eight year period, 1967 to 1974. The following trend is calculated:

*Fresno total television revenue, 1967 to 1974, and projection to 1985*

Calendar year:	Fresno television revenue
1967	\$4,359,000
1968	4,741,000
1969	4,690,000
1970	4,794,000
1971	5,099,000
1972	6,965,000
1973	7,760,000
1974	8,346,000
1985	14,498,000

In the second stage, Cooper constructs a model which estimates ratios which relate "share of local audience" to "share of market revenue" for KMPH. This model assumes (no data is offered) that the revenue/audience ratios can be expected to decrease as the KMPH share of audience increases, as follows:

KMPH share of local audience	Revenue to audience share ratio	Estimated share of market revenue (percent)
7 percent	1.560:1	10.92
8 percent	1.525	12.20
9 percent	1.490	13.41
10 percent	1.455	14.55
11 percent	1.420	15.62
12 percent	1.385	16.62
13 percent	1.350	17.55
14 percent	1.315	18.41
15 percent	1.280	19.20
20 percent	1.105	22.10
23 percent	1.00:1	23.00

In the third step, Cooper uses the above model to estimate the KMPH share of revenue in 1985 for each of the share of audience estimates based on local stations only and using the 1985 market revenue estimate of \$14,498,000, as follows:

CATV status	KMPH Share of (percent)		KMPH estimated revenue	KMPH estimated revenue loss	Percent revenue loss
	Audi- ence	Revenue			
At status quo.....	13.7	18.15	\$2,631,400		
50 percent CATV pene- tration.....	12.1	16.71	2,422,600	\$-208,800	-7.9
60 percent CATV pene- tration.....	11.8	16.43	2,382,000	-249,400	-9.5

### Staff Evaluation

Cooper estimates Fresno television market revenue by using a similar linear trend model. Simple extrapolation methods such as those used by Cooper are frequently the basis for making casual private forecasts of variables ranging from GNP to inventories of a single firm. Although these models can be useful as a way of quickly formulating initial forecasts, they usually provide little forecasting accuracy, because they simply assume that the dependent variable (revenue in this case) will increase in constant absolute amounts each time period. The analyst who estimates a simpler linear trend model is at least advised to calculate a standard error of forecast and forecast confidence interval following normal statistical procedures.<sup>11</sup> Cooper did not disclose the standard

<sup>11</sup> Robert S. Pindyck & Daniel L. Rubinfeld, *Economic Models and Economic Forecasts* (New York: McGraw Hill, 1976), pp. 421-518.

error of forecast and forecast confidence interval of his model, nor did he disclose the equation. However, by using his data points, the equation is easily derived as follows:

$$\text{Market Revenue} = 1,170,215,833 + 596,833 \times \text{Year}$$

The standard error of forecast for the predicted revenues of 1985 is \$1,643,403. Therefore, for KMPH one can be reasonably confident (at the 95% confidence level) that the 1985 revenues for the Fresno television market will lie between \$10,476,593 and \$18,519,407.<sup>12</sup> The fact that the 95 percent prediction interval is so large suggests the limiting nature of the simple linear trend model. It ought not be relied upon for any policy decisions. A more sophisticated model (with additional explanatory variables) and more sample observations would most likely lead to a smaller forecast interval.

In the second stage, Cooper uses a table of revenue/audience ratios to estimate the KMPH share of

<sup>12</sup> A 95% confidence interval is placed around the predicted market revenue for 1985 using the standard formula

$$\hat{Y} \pm ts \left( 1 + \frac{1}{n} + \frac{(x_k - \bar{x})^2}{\sum (x_i - \bar{x})^2} \right)^{1/2}$$

In this case:

$\hat{Y}$  is the predicted revenue = \$14,498,000

$S$  is the standard error of estimate = 663,067

$n$  is the number of observations = 8

$x_k$  is the forecast year = 1985

$\bar{x}$  is the mean year = 1970.5

$t$  is the t-statistic for 6 degrees of freedom and 95% level of confidence = 2.447



revenue in 1985. In using this table, he assumes that the ratio between revenue share and audience share decreases as KMPH's audience share increases. However, no analysis or data is offered to support this critical assumption. Therefore, there is no indication of its reliability, and it should be considered only as conjecture.

Cooper's method of relating "local audience share" to "local television revenue" in order to project revenues for KMPH wholly discounts a large part of KMPH's audience. KMPH is not assigned to the Fresno ADI nor any other ADI. Although KMPH receives most of its audience from the southern part of the Fresno ADI, it also receives a large audience share from the Bakersfield ADI.<sup>13</sup> For example, KMPH receives a share of 7 percent during the early fringe day-part in the Bakersfield ADI. This is a higher audience share than received by KJTV, a Bakersfield station. It is highly likely that KMPH is compensated for this audience. However, Cooper offers no evidence that KMPH is not now nor will in the future be compensated for its Bakersfield audience. It must be concluded that this model is not an adequate predictor.

JOHN S. WHETZELL, Jr.,  
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<sup>13</sup> KMPH receives 13% of its 9 AM to Midnight audience from the Bakersfield ADI.

*Urban areas not holding or applying for a certificate of compliance*

	Population
Fresno:	
Coalinga City .....	6,161
Kerman City .....	2,667
Kingsburg City .....	3,843
Orange Cove City .....	3,392
Reedley City .....	8,131
Sanger City .....	10,088
Selman City .....	7,459
Calwa .....	5,191
Kings:	
Corcoran City .....	5,249
Lemoore City .....	4,219
Lemoore Station .....	8,512
Merced:	
Winton .....	3,393
Livingston City .....	2,588
Tulare:	
Pinuba .....	7,917
Earlimart .....	3,080
Exeter City .....	4,475
Farmersville City .....	3,456
Lindsay City .....	5,206
Cutler .....	2,503
Orosi .....	2,757
Total .....	100,287